No. 90-350

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

IN RE GERALD J. SANDERFOOT, DEBTOR.

JEANNE FARREY, f/k/a JEANNE SANDERFOOT,
Petitioner,

v.

GERALD J. SANDERFOOT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

This case presents a single question of federal law, one that has split the Courts of Appeals, based on undisputed facts:

Does the federal bankruptcy code give an individual debtor the unilateral right to avoid a lien granted the debtor's spouse against the family homestead by a state divorce court as a condition of its award of the homestead's title to the debtor?

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GERALD J. SANDERFOOT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Jeanne Farrey petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Seventh Circuit entered in this case on March 30, 1990.

OPINIONS BELOW

The 2-1 opinion of the Court of Appeals is reported at 899 F.2d 598, reprinted in the appendix ("App.") to this petition. App., pp. 1a-21a.

The decision of the U.S. District Court for the Eastern District of Wisconsin (Gordon, J.), which the Court of Appeals affirmed, is reported at 92 B.R. 802. App., pp. 22a-24a.

The decision of the U.S. Bankruptcy Court for the Eastern District of Wisconsin (McGarity, J.), which the District Court reversed, is reported at 83 B.R. 564. App., pp. 25a-38a.

The Findings of Fact, Conclusions of Law, and Judgment of Divorce rendered by the Circuit Court for Outagamie County, Wisconsin, have not been reported. Portions of this material are reprinted in the appendix. App., pp. 49a-61a.

JURISDICTION

The Court of Appeals entered its judgment on March 30, 1990. On July 6, 1990, in response to a motion timely filed by the petitioner, Justice Stevens ordered that the time for filing this petition be extended to and include August 27, 1990. This Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. § 1254(1).

FEDERAL STATUTES INVOLVED

11 U.S.C. § 522 provides in part:

Exemptions.

(b) . . . an individual debtor may exempt from property of the estate the property listed in either paragraph (1) or, in the alternative, paragraph (2) of this subsection . . . . Such property is—

(1) property that is specified under subsection (d) of this section, unless the State law that is applicable to the debtor under paragraph (2)(A) of this subsection specifically does not so authorize; or, in the alternative,

(2)(A) any property that is exempt under . . . State or local law that is applicable on the date of the filing of the petition . . . .

* * * *

(f) Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is—

(1) a judicial lien. . . .

11 U.S.C. § 101 provides in part:

Definitions. In this title—

* * * *

(32) "judicial lien" means lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding;

(33) "lien" means charge against or interest in property to secure payment of a debt or performance of an obligation.

STATE STATUTE INVOLVED

Wis. Stat. § 815.20. *Homestead exemption definition.*

(1) An exempt homestead . . . selected by a resident owner and occupied by him or her shall be exempt from execution, from the lien of every judgment and from liability for the debts of the owner to the amount of $40,000, except mortgages, laborers', mechanics' and purchase money liens and taxes and except as otherwise provided. . . .

STATEMENT OF THE CASE

Nature of the case. With its decision, the U.S. Court of Appeals for the Seventh Circuit has created an even division among the Circuits on this question of law, a question that inevitably will affect many of the 1.2 million divorces granted every year in this country. The bankruptcy code now can be used to defy state divorce law, threatening the financial well-being of every spouse awarded a lien by a divorce court to secure his or her share of the marital estate. The result is, in the words of Judge Richard Posner's dissent, "a perversion of bankruptcy law" that "offends the moral sense of laymen" by permitting a debtor spouse to manipulate federal law "to steal from his former wife." App., pp. 18a-20a.

The disagreement among the Circuits on the issue runs deep. The Seventh and the Ninth will permit a debtor to invoke the bankruptcy code to avoid a lien against an exempt homestead awarded the non-debtor spouse in a

divorce decree; the Eighth will not, and the Tenth almost always will not. Without a consensus on the question, more divorce cases will be contested and ultimately decided not in the state courts under state law but in the bankruptcy courts under federal law. To nullify a divorce judgment's property division, escaping financial responsibility, the party awarded the family homestead need only file a petition for bankruptcy to avoid, unilaterally and automatically, the homestead lien awarded the party's former spouse in the same judgment.

When divorce courts divide the marital estate, they commonly award one party sole title to the family home and the other party property of equal value. If there are few readily divisible assets, however, courts often order the party awarded the homestead to make cash payments to balance the scale, imposing a lien on the real property to secure those payments. The state courts that resolve property disputes and, no less, the parties themselves need to know if those liens, far from providing "security," offer an invitation to bankruptcy for one spouse and to financial ruin for the other.

The issue has the potential to arise as often as divorced men and women can file for bankruptcy. The Circuits are in conflict. Only this Court, by resolving the question, can ensure certain and equal treatment with an appropriate construction of the federal bankruptcy law that preserves the states' ability to distribute marital property fairly when they dissolve marriages.

Statement of facts. The facts of this case are undisputed. Jeanne Farrey and Gerald Sanderfoot married on August 12, 1966. They eventually bought a home, jointly, on 27 acres of land in Hortonville, Wisconsin, where they raised their three children. On September 12, 1986, more than 20 years after their marriage, they were divorced. App., pp. 49a-61a. The Outagamie County Circuit Court's divorce judgment, entered on February 5, 1987, awarded

each party precisely one-half of their $60,600.68 net marital estate. *Id.* at 61a.

For her share, Ms. Farrey received a small amount of personal property and one-half of the proceeds of a court-ordered auction of other property. The court gave Mr. Sanderfoot the family home and land, which it valued at $104,000.00, and all of the remaining personal property, including two cars and a business. *Id.* at 51a. The court decree also allocated the couple's liabilities. After this initial assignment of assets and debts, Mr. Sanderfoot had a net estate of $59,508.79. Ms. Farrey had $1,091.90. *Id.* at 60a-61a.

To equalize the property division pursuant to state law, the trial court awarded Ms. Farrey half of the difference in their net estates, $29,208.44, ordering Mr. Sanderfoot to pay her that amount in two equal installments—the first due on January 10, 1987, the second on April 10, 1987. To secure that debt and ensure the equal division of their property, the court awarded Ms. Farrey, at the same time and in the same divorce decree, a lien against the family home. *Id.* at 57a. The judgment also ordered Mr. Sanderfoot to pay child support, maintenance, and the parties' attorneys' fees.

On May 4, 1987, just three months after the divorce judgment, Mr. Sanderfoot filed a Chapter 7 bankruptcy petition. *Id.* at 44a. By then, he still had not "complied with a single order of the state court." *In re Sanderfoot*, 83 B.R. 564, 565 (Bankr. E.D. Wis. 1988), App. at 26a. The facts were undisputed, the bankruptcy court noted, and Mr. Sanderfoot's conduct clear:

> He had not conducted the auction, delivered the personal property to his ex-wife, or made a single payment toward child support, maintenance or attorney fees. He had not made the cash payments that were ordered by the court to be made to his ex-wife as compensation for her interest in the [homestead] property.

Id. Mr. Sanderfoot listed the marital home on the schedule of assets filed with his bankruptcy petition, App. at 48a, designating the family's home as exempt homestead property under Wis. Stat. § 815.20.[1]

Procedural history. Mr. Sanderfoot then filed a motion under 11 U.S.C. § 522(f)(1) asking the bankruptcy court to permit him to avoid Ms. Farrey's lien against the property because it was a judicial lien that impaired his homestead exemption.[2] Ms. Farrey objected, claiming that the lien had never "fix[ed]" to Mr. Sanderfoot's interest in the exempt homestead. The bankruptcy court denied Mr. Sanderfoot's motion. 83 B.R. at 571, App. at 38a; ~~*see id.* at~~ 39a.

The court reviewed the statute's legislative history to determine the purpose of the lien avoidance statute. "[T]he policy behind 11 U.S.C. § 522(f)(1) was not to circumvent a divorce court's decision," it concluded, but to allow the debtor to prevent creditors from destroying statutory exemptions by bringing legal action against the debtor shortly before bankruptcy. App. at 28a. The "fixing of a lien on an interest of the debtor," the bankruptcy court found, had never occurred to trigger the avoidance statute:

> In this case, regardless of how title was previously held, the debtor acquired his interest by virtue of the divorce judgment and subject to the lien. The lien did not attach to the debtor's interest, and it is accordingly not avoidable.

Id. at 33a.

Mr. Sanderfoot appealed the bankruptcy court's order to the U.S. District Court for the Eastern District of Wisconsin under 28 U.S.C. § 158. The district court reversed the bankruptcy court's decision and permitted Mr. Sanderfoot to avoid the lien. *In re Sanderfoot*, 92 B.R. 802 (E.D. Wis. 1988), App. at 22a-24a. It rejected the bankruptcy court's conclusion that the lien had not attached to the debtor's property.

Instead, the district court found that the divorce judgment had extinguished all of the previous property interests held by the parties, creating new interests: Mr. Sanderfoot received the home, Ms. Farrey a lien against it. Thereafter, when Mr. Sanderfoot filed for bankruptcy, section 522(f)(1) allowed him to avoid the "judicial lien" that had "fix[ed]" against his property interest. *Id.* at 24a. The district court made no reference to the statute's legislative history or purpose.

Ms. Farrey appealed to the U.S. Court of Appeals for the Seventh Circuit, which affirmed the district court's decision. *In re Sanderfoot*, 899 F.2d 598 (7th Cir. 1990), App. at 1a-21a. After acknowledging the "difficulty" of the issue and the conflicting decisions in other circuits, *id.* at 5a, the court's majority found that the divorce judgment had conveyed title to the family's home to Mr. Sanderfoot. Ms. Farrey's lien against the property, obtained by "legal proceedings," fit the unambiguous definition of "judicial lien" in 11 U.S.C. § 101(32), and that made it avoidable under 11 U.S.C. § 522(f)(1). *Id.* at 11a. Like the district court, the Court of Appeals' majority ignored the statute's legislative history and purpose.

In a sharply-worded dissent, Judge Posner said the majority had misunderstood the lien-avoidance provision

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[1] Wis. Stat. § 815.20 provides:

Homestead exemption definition.

(1) An exempt homestead . . . selected by a resident owner and occupied by him or her shall be exempt from execution, from the lien of every judgment and from liability for the debts of the owner to the amount of $40,000, except mortgages, laborers', mechanics' and purchase money liens and taxes and except as otherwise provided. . . .

[2] Neither Mr. Sanderfoot nor the trustee attempted to rely on the bankruptcy code's preference provisions to "avoid any transfer of an interest of the debtor in property—. . . ." 11 U.S.C. § 547(b).

and allowed the bankruptcy code to become a "tool by which bounders defraud their spouses." *Id.* at 18a. He maintained that the correct statutory interpretation would not avoid the lien but, rather, "do justice here without deforming the Bankruptcy Code." *Id.* at 20a. Since the lien "was created in the same document" that gave the husband title to the property, the dissent concluded, the "lien qualified that interest from the start. There was no instant at which [Mr.] Sanderfoot owned the property free and clear of the wife's interest." *Id.* at 21a. Mr. Sanderfoot did not have sole title to the property when the court awarded Ms. Farrey a lien on it and, accordingly, the lien was not avoidable.

Basis for federal jurisdiction. The U.S. Bankruptcy Court for the Eastern District of Wisconsin exercised jurisdiction over this matter pursuant to 28 U.S.C. § 157 after the debtor filed his Chapter 7 petition. The U.S. District Court for the Eastern District of Wisconsin heard the appeal from the decision of the bankruptcy court under 28 U.S.C. § 158. No jurisdictional issues have been raised at any point in this case.

REASONS FOR GRANTING THE WRIT

I. THE SEVENTH CIRCUIT'S DECISION TO PERMIT A SPOUSE TO AVOID A HOMESTEAD LIEN, AWARDED TO THE OTHER SPOUSE IN A DIVORCE DECREE, CONFLICTS WITH DECISIONS IN TWO OTHER CIRCUITS.

There is now an even split in the four Circuits that have considered this issue. In divorce/bankruptcy cases with virtually identical facts, the Seventh and Ninth Circuits have held judicial liens avoidable while the Eighth and Tenth Circuits have found they are not.[3] As a result, the courts that invariably must consider the issue—state divorce courts, bankruptcy courts, and district courts—"wade into waters muddied before [them] with little hope of settling anything but the instant dispute."[4] This conflict, which has far-reaching ramifications for both the state and federal courts, can be resolved definitively only by this Court.

Just how "muddy" the waters have become is apparent not only from the conflicting results in the cases but from their disparate reasoning. The courts that have found the liens non-avoidable are particularly divided in approach. The predominant "survival" theory,[5] based on a "pre-existing property right," has been advanced by the Eighth Circuit. In *Boyd v. Robinson*, 741 F.2d 1112 (8th Cir. 1984), the court refused to invalidate the lien because it had not attached to the debtor's interest in the property. "[The lien] simply recognized, and provided a remedy to enforce, a pre-existing property right in the marital home." *Id.* at 1115.

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[3] *Compare In re Sanderfoot*, 899 F.2d 598 (7th Cir. 1990), App. at 1a, and *In re Pederson*, 875 F.2d 781 (9th Cir. 1989), *with In re Borman*, 886 F.2d 273 (10th Cir. 1989), *In re Donahue*, 862 F.2d 259 (10th Cir. 1988), and *Boyd v. Robinson*, 741 F.2d 1112 (8th Cir. 1984).

[4] *In re Rittenhouse*, 103 B.R. 250, 252 (Bankr. D. Kan. 1989).

[5] *Id.*

The decisions that have adopted this concept, including the bankruptcy court decision reversed here, have cited a variety of sources. The court in *Boyd* relied on a state law that recognized a spouse's general property interest in homestead property acquired during the marriage with marital assets. 741 F.2d at 1114. Other courts have found the pre-existing property right in the divorce judgment itself because it conveys the exempt homestead property to the debtor-spouse while it simultaneously creates a lien for the other spouse.[6] Since the debtor-spouse never has the property without the lien, the lien never "attaches" to an unencumbered interest of the debtor.[7]

The Tenth Circuit has adopted a different approach: liens acquired in a divorce decree are not "judicial liens" at all but equitable liens immune from avoidance under section 522(f)(1). In its two most recent decisions,[8] *In re Borman* and *In re Donahue*, *supra* at 9 n 3, the Tenth Circuit held that the property awarded the debtor-spouse was intended to generate the proceeds from which the debt to the lien holder spouse ultimately would be paid. Allowing avoidance, permitting the debtor-

[6] *In re Sanderfoot*, 83 B.R. at 568, App. at 30a; *see also* Wis. Stat. § 766.31 (spouses have equal undivided interests in property earned or acquired during marriage).

[7] *See In re Rittenhouse*, 103 B.R. at 253-54. The *Sanderfoot* divorce decree stated that "[a]ll property and money received or retained by the parties shall be the separate property of the respective parties, free and clear of any right, title, interest, or claim of the other party, and each party shall have the right to deal with and dispose of his or her separate property as fully and effectively as if the parties had never been married, *except as expressly provided for in this* [*order*]. . . ." (Emphasis added.) App. at 58a.

[8] In an earlier case, *Maus v. Maus*, 837 F.2d 935 (10th Cir. 1988), the Tenth Circuit had found a lien avoidable because the divorce decree had awarded the property to the debtor-spouse "free and clear of any and all claims" of the creditor spouse. *Id.* at 937. In *Borman* and *Donahue*, however, the Tenth Circuit confined *Maus* to its particular facts. *Borman*, 886 F.2d at 274; *Donahue*, 862 F.2d at 265.

spouse to escape that obligation, would unjustly enrich the debtor. *See, e.g., Borman*, 886 F.2d at 275; *see also Hart v. Hart (In re Hart)*, 50 B.R. 956, 960-61 (Bankr. D. Nev. 1985).

Yet another survival theory employed by some bankruptcy courts assumes that the lien is not really a "lien" at all but, rather, a security interest in the property.[9] This approach necessarily is limited by the bankruptcy code's definition of a "security interest" in 11 U.S.C. § 101(45) as a "lien created by agreement." The "security interest" rationale has real force, accordingly, only when the division of property in the divorce somehow can be construed as "by agreement" rather than as judicially-imposed.

The Ninth Circuit, joined now by the Seventh, has decided that the liens granted in divorce judgments are judicial liens, that they attach to a property interest of the debtor-spouse, and that section 522(f)(1) permits the liens to be avoided.[10] While both Courts of Appeals acknowledged the harsh results of their decisions, *Sanderfoot*, 899 F.2d at 605, App. at 16a; *Pederson*, 875 F.2d at 784, they found the language of the statute unambiguous—leaving no choice, they said, but to find the liens avoidable:

> Like the Ninth Circuit, we therefore respectfully decline to follow *Boyd*. We conclude that *Pederson* and its progeny are better reasoned and faithful to the plain language of section 522(f).

App. at 10a.

[9] *Wicks v. Wicks (In re Wicks)*, 26 B.R. 769, 771-72 (Bankr. D. Minn. 1982); *Cowan v. Cowan (In re Scott)*, 12 B.R. 613, 617-18 (Bankr. W.D. Okla. 1981).

[10] *In re Sanderfoot, supra*, App. at 1a; *In re Pederson, supra*; *see also In re Duncan*, 85 B.R. 80, 82-83 (W.D. Wis. 1988) (finding "unpersuasive" the argument that the lien against the marital home awarded in a divorce judgment was an equitable mortgage or any other type of non-judicial lien).

In this case, the dissenting judge found the "plain language" of the statute ambiguous, yet the intent of Congress clear: "to thwart unsecured creditors who, sensing impending bankruptcy, rush into court to obtain liens on exempt property, thus frustrating the purpose of the [statutory] exemptions." *Id.* at 18a. The lien imposed on the Farrey-Sanderfoot home was designed to preserve the pre-existing property right of the ex-spouse, not to enable a creditor to defeat a debtor's homestead exemption. Accordingly, Judge Posner maintained, the lien-avoidance provision should not be applicable. *Id.*

The waters are muddy indeed. The status of a lien imposed against the family home to secure a spouse's obligations in a divorce decree remains uncertain. Only this Court can reconcile the conflicting decisions and the conflicting reasoning.

II. THE UNCERTAINTY SURROUNDING THE APPLICATION OF THE BANKRUPTCY LAW HAS A SIGNIFICANT IMPACT ON STATE AND FEDERAL COURTS AND ON COUNTLESS DIVORCE LITIGANTS.

The final disposition of this case will determine whether Jeanne Farrey ever will receive the equal distribution of property ordered by the state court or whether she will receive virtually nothing. If the Court of Appeals' decision stands, however, it will have a devastating impact on far more than just Jeanne Farrey. In 1988, the state courts of this country granted almost 1.2 million divorces.[11] Although the annual rates of divorce vary, half of all marriages end in divorce. All of these divorces, whether they involve the rich or the poor, inevitably divide the parties' property. Some divorces will be consensual, judicially approved but not imposed, and the parties by stipulation will execute notes and

[11] U.S. Department of Commerce, *Statistical Abstract of the United States* 89 (1990).

mortgages to secure a distribution that should not be avoidable in bankruptcy. Many divorces, however, will be contested.

A. The Seventh Circuit's Decision Will Severely Handicap The State Divorce Courts.

The division of a family's property often leads to bitter conflict in divorce.[12] It is often necessary for a divorce court dividing the marital estate to award exempt property to one spouse and give the other spouse a lien on that property to ensure the performance of the financial obligations imposed by the divorce judgment. *In re Sanderfoot*, 899 F.2d at 605, App. at 16a.[13] Indeed, every case cited in the Seventh Circuit's decision involved just those facts, varied only by the language of the divorce judgments themselves. Courts use the lien either to secure the lien holder's pre-divorce interest until the home eventually can be sold or to ensure an equitable division of assets when the spouse awarded the home does not have enough ready cash to pay the spouse who must leave it.

For most families, the home is the principal—if not the only—asset of real value. Accordingly, a homestead lien often provides the departing spouse the only practical guarantee that he or she actually will receive the cash or other assets awarded by the divorce judgment. Under the decisions of the Seventh and Ninth Circuits, however, every divorce decree, of the 1.2 million granted annually, that employs a judicially-awarded lien now comes with a price: the very real possibility that the debtor-spouse will file for bankruptcy to avoid the lien.

The divorce courts award liens because they are a well-established, practical and effective tool for dividing

[12] Santelmann, *Divvying Up Before You Split*, 144 Forbes 276 (Nov. 27, 1989).

[13] *See also In re Worth*, 100 B.R. 834, 837 (Bankr. N.D. Tex. 1989).

marital property. To the parties and the state courts mandated by law to make equitable property distributions on divorce,[14] the status of those liens is not an abstract legal question. A property division theoretically "equal" at the time of the divorce may become grossly inequitable just weeks, or even moments, later if the debtor-spouse can avoid the lien by filing for bankruptcy. That is precisely what happened to Jeanne Farrey.

The law of divorce and the law of bankruptcy already share a complex, symbiotic relationship. State divorce laws seek to divide marital property to reflect the marital partnership and to protect dependent spouses and children. Federal bankruptcy law seeks to give a bankrupt debtor a fresh start. The bankruptcy code attempts to balance the state and federal objectives by providing that the child support, alimony, and maintenance obligations of a debtor are not dischargeable.[15] By allowing the debtor to avoid a lien awarded his ex-spouse in their divorce judgment, the Seventh Circuit in this decision has made the complex bankruptcy-divorce relationship impenetrable and, more importantly, upset a balance explicitly struck by Congress and the states.

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[14] Forty-two states and the District of Columbia have equitable distribution laws. Wis. Stat. § 767.255 requires a court, for example, to "presume" that "property is to be divided equally between the parties. . . ."

[15] 11 U.S.C. § 523(a)(5):

> (a) A discharge under . . . this title does not discharge an individual debtor from any debt. . .
>
> * * * *
>
> (5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record or property settlement agreement, but not to the extent that. . .
>
> * * * *
>
> (B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support.

Some property awards may be dischargeable in bankruptcy, but that possibility—far from providing support for the Seventh Circuit's decision—undercuts it. The determination of dischargeability is a matter for the bankruptcy court, not the debtor. The avoidance provision, by contrast, is virtually automatic. As the Seventh and Ninth Circuits have construed it, the statute also prohibits the imposition of a judicial lien to secure nondischargeable obligations like child support. In addition, many state courts no doubt impose a lien on exempt property "knowing" that interest could *not* be discharged. *See In re Sanderfoot*, 83 B.R. at 566, App. at 27a.

Without the ability to award a non-avoidable lien, divorce courts now will have few practical alternatives for ensuring that a marital estate will be distributed equitably. A state court could order the homestead immediately sold with the proceeds divided appropriately. Yet that would result, needlessly in many cases, in forcing children from their family home regardless of the family's financial status or which parent has custody. It would destroy, moreover, the very rationale for a homestead exemption.

In theory, a court alternatively could order the title to the homestead held jointly by both spouses. But that would deprive the spouse who left the homestead of the liquid assets necessary to establish a new home. It also would leave the home's maintenance and control divided between two people who had terminated their partnership. Finally, a divorce court could order the debtor-spouse to execute a mortgage but, as the Seventh Circuit's majority itself recognized, that probably would not meet the bankruptcy code's definition in 11 U.S.C. § 101(45) of a "security interest." 899 F.2d at 604 n.17, App. at 14a. The lien would remain avoidable. *Id.* at 15a. Moreover, it would create just the kind of "havoc" the Seventh Circuit fears by permitting state divorce law to vary federal bankruptcy law. *Id.*

B. The Application Of The Lien-Avoidance Provision To A Divorce Judgment Invades The Province Of The States.

It is well-established that domestic relations "has long been regarded as a virtually exclusive province of the States." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975). And so has the need to protect families from financial devastation, in or out of bankruptcy, through state statutory exemptions that shield some assets from creditors. In enacting the bankruptcy code, Congress recognized those interests through section 523(a)(5) and the complementary provision of section 522(b) that permits a debtor to elect the state's statutory exemptions in bankruptcy. *See generally, In re Sullivan*, 680 F.2d 1131 (7th Cir. 1982), *cert. denied*, 459 U.S. 992 (1982).

It is particularly ironic that Mr. Sanderfoot invoked Wisconsin's homestead exemption to avoid this lien. The purpose of that exemption, enacted in the first session of the state legislature, Wis. R.S. ch. 102, §§ 51-52, 56, 59 (1849), is to provide families "with the right to enjoy the comforts of home life free from claims of creditors."[16] In *Warsco v. Oshkosh Sav. and Trust Co.*, 190 Wis. 87, 208 N.W. 886 (1926), the Wisconsin Supreme Court described the public policy underlying the homestead exemption statute:

> [I]t is proper [that each citizen] should have a home where his family may be sheltered, and live beyond the reach of financial misfortune and the demands of creditors . . . . [The exemption] is intended to secure to the householder a home for himself and his family. . . . Such protection extends not only to the owner of the homestead, but to his wife and family and it shelters them in the event of financial embarrassment.

[16] Comment, *Homestead Exemption Interests*, 1981 Wis. L. Rev. 697, 705.

Id. at 93; *see also Schwitzke v. American Nat'l Bank*, 242 Wis. 521, 526-27, 8 N.W.2d 303, 305 (1943). The purpose of the exemption is to protect the debtor *and* his family from creditors, not to provide the debtor with a fail-safe device to deny his family the benefits of their property.

In *Wozniak v. Wozniak*, 121 Wis. 2d 330, 359 N.W.2d 147 (1984), the Wisconsin Supreme Court held that a real estate lien, awarded to secure payment of a divorce judgment, was a mortgage lien that survived the death of a joint tenant.[17] The court concluded that " '[t]he purpose of the instrument is the controlling feature under all circumstances. If that is security . . . , the instrument is treated as a mortgage and nothing else.' " *Id.* at 336, quoting *Smith v. Pfluger*, 126 Wis. 253, 256, 105 N.W. 476 (1905). Under Wisconsin law, then, Ms. Farrey's lien, though imposed by a judge, is a mortgage. And it should have the same status as the two other mortgages of record against the family home. *See* App. at 47a. Under the Seventh Circuit's decision, however, Ms. Farrey's lien has no status at all.[18]

The Wisconsin homestead exemption, applicable under 11 U.S.C. § 522(b), protects up to $40,000.00 of equity in a home, but it does *not* exempt "mortgages, laborers', mechanics' and purchase money liens and taxes. . . ." Wis. Stat. § 815.20. Mr. Sanderfoot's decision to file for

[17] The court found it clear from the divorce judgment that the trial court "intended to give William Wozniak a security interest in the specific property. . . . This court has previously stated that a transfer of property as security, *regardless of the form thereof*, is a mortgage." 121 Wis. 2d at 336 (citations omitted) (emphasis added).

[18] Like a mortgage, the Sanderfoot divorce judgment was recorded in the office of the register of deeds in Outagamie County as required by Wis. Stat. § 767.255: "the portion of the [divorce] judgment which affects title to real estate shall be recorded in the office of the register of deeds of the county in which the lands so affected are situated."

bankruptcy surely does not affect the secured interest of the financial institution that lent the money to buy the property in 1979. Yet, the Seventh Circuit's majority has decided, that same bankruptcy petition avoids the secured interest of Jeanne Farrey who, for more than 20 years, shared a marriage and a family with him. Through the bankruptcy law, Mr. Sanderfoot has used the Wisconsin homestead exemption, an exemption intended to protect both him and Ms. Farrey from creditors, to eliminate her interest in the family's home.

The uncertainty surrounding this issue has a collateral, if less tangible, effect. The Congress and the courts suffer from a public perception that they have passed or affirmed laws that are "unfair" and that they are blind to the practical implications of their decisions. This is especially true in the area of domestic litigation, where many people have their only contact with the judicial system:

> [There is a] pervasive dissatisfaction . . . with what [the] courts do. It is almost universally thought that . . . in dividing property domestic courts behave in a high-handed, arbitrary, and unjust way. Part of that complaint is a response to the relative poverty, inconvenience, and emotional voids that divorce creates. Another more justified part comes from our lack of consensus about what constitutes fairness and justice in domestic matters. A court cannot do justice unless it has some clear guidance about what justice is. At the moment, that guidance is lacking.[19]

Justice, fairness and guidance, as the dissenting opinion observed, are little in evidence in this case.

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[19] R. Neely, *The Divorce Decision: The Legal and Human Consequences of Ending a Marriage* 4 (1984).

III. THE SEVENTH CIRCUIT ERRED, AS A MATTER OF LAW, BY CONSTRUING 11 U.S.C. § 522(f)(1) WITHOUT REGARD FOR THE INTENT OF CONGRESS.

The trial court awarded Ms. Farrey property with a net value of $1,091.90 while her husband received $59,508.79 in property including the family's home. To achieve the equal property distribution presumptively required by Wisconsin law, the court ordered Mr. Sanderfoot to pay his wife half of the difference in two installments over the next seven months. She received a lien against their former home to secure those payments. Three months later, having complied with not one of the financial obligations imposed by the divorce decree, Mr. Sanderfoot filed for bankruptcy and moved to avoid her lien—the only interest she retained in the family's marital assets.

Sometimes courts have to make decisions that offend "the moral sense of laymen," Judge Posner wrote, and that "does not prove a decision wrong. Institutional or systemic considerations, themselves morally significant, but invisible to the laity, may outweigh the tug of simple justice. But they do not do so here." 899 F.2d at 606, App. at 17a. The statute *is* ambiguous, he concluded, and justice requires its interpretation consistent with both common sense and the intent of Congress.

The Seventh Circuit's majority began its analysis of section 522(f)(1) by acknowledging the disparate results reached by the courts that had interpreted the statute. *Id.* at 600, App. at 5a. It then decided that the language of the statute was clear, adopting the reasoning of the Ninth Circuit in *Pederson*, 875 F.2d 781: the lien attached to the debtor-spouse's property, not to the lien holder's pre-existing property right. The court characterized as "strained" the rationale of *Boyd* and its progeny, which had interpreted the same statute but come to the opposite conclusion. 899 F.2d at 605, App. at 15a.

It is difficult to accept the court's conclusion that the statute's language and meaning somehow are "plain," facially unambiguous, when so many courts have interpreted it so differently. A statute is ambiguous if it is capable of being construed in different ways by reasonably well-informed people. Indeed, "[t]he fact that a statute has been interpreted differently by different courts has been cited as evidence that the statute is ambiguous and unclear." [20]

Does the term "judicial lien" in 11 U.S.C. § 101(32) encompass liens in divorce judgments? Does the phrase "fixing of a lien" in 11 U.S.C. § 522(f)(1) describe the simultaneous imposition of a lien with a property award? The answer to those questions lies neither in the Code's text or its context. Yet, the Seventh Circuit's majority summarily dismissed as "implausible and unsupported by the language of the Code" twelve separate decisions by other bankruptcy courts and Courts of Appeals that disagreed with it. 899 F.2d at 604 & n.14, App. at 13a.

The majority refused to look beyond the statute's "plain meaning" despite its "seemingly inequitable results in a divorce setting." Feeling compelled to "give effect to the policy decisions embodied in the express language," *id.* at 15a, the Seventh Circuit decided the case without ever penetrating the surface of the statute. It determined the "clear legislative intent" of Congress, *id.* at 16a, without ever taking into account the statute's legislative history and purpose.

Even were the language as "plain" as the Seventh Circuit has suggested, however, that does not end the inquiry. An appellate court should set aside the "strict language" where the " 'literal application of a statute will produce a result demonstrably at odds with the intention of the drafters. . . .' " (citation omitted). *United States*

[20] 2A C. Sands, *Sutherland on Statutory Construction*, § 46.04 (4th ed. 1984) ("Sutherland").

v. Ron Pair Enterprises, Inc., 489 U.S. 235 (1989), cited with approval, *In re Sanderfoot*, 899 F.2d at 600, App. at 6a. Moreover, when a statute "contains latent ambiguities despite its superficial clarity, the court may turn to the legislative history . . . for guidance." [21] The Seventh Circuit's majority ignored those admonitions, and the result, in the words of the dissenting judge, is "a perversion of bankruptcy law." 899 F.2d at 606, App. at 18a.

The purpose of section 522(f)(1) "appears unmistakably from legislative history the purport and significance of which are unquestioned"—to prevent unsecured creditors from obtaining judicial liens as soon as they learn a debtor is about to file for bankruptcy, thereby frustrating the exemptions allowed by the bankruptcy code and state law. *Id.* The lien-avoidance provision "allows the debtor to undo the actions of creditors that bring legal action against the debtor shortly before bankruptcy. Bankruptcy exists to provide relief for an overburdened debtor. If a creditor beats the debtor into court, the debtor is nevertheless entitled to his exemptions."[22]

The lien in this case was not created to permit an unsecured creditor to defeat a debtor's exemption. The divorce court awarded it to secure an obligation the court imposed on the debtor-spouse to his wife in exchange for the court's award of the homestead to the debtor. The lien did not arise in the context of impending bankruptcy but during a divorce where "the relationship of the parties . . . is not a debtor-creditor relationship. . . . This distinction is crucial. It is clear that Congress intended to include within the ambit of sec. 522(f)(1) only those lien interests created in favor of creditors, not spouses."[23]

[21] Sutherland § 46.04 (4th ed. 1984 and Supp. 1990).

[22] H.R. Rep. No. 595, 95th Cong., 1st Sess. 126 (1977).

[23] *In re Thomas*, 32 B.R. 11, 12 (Bankr. D. Or. 1983).

The Seventh Circuit based its decision on the familiar principle that it is for Congress, not the courts, to make policy. When Congress has made a decision, the courts must respect its judgment. 899 F.2d at 605, App. at 16a. But the court ignored Congress's very purpose in enacting the statute. In the words of the dissent, it is difficult "to understand why we should . . . ignore the purpose of the lien-avoidance statute in order to achieve a result that does not promote, but instead denies, simple justice—laymen's justice." *Id.* at 19a-20a.

The Seventh Circuit's analysis was flawed in yet another fundamental way. Section 522(f)(1) allows a debtor to avoid the "fixing of a lien on an interest of the debtor in property." In other words, a debtor can avoid a lien that attaches after he acquires the interest in the property. He cannot avoid a lien if he acquired the property *subject* to the lien.[24]

In this case, the divorce judgment simultaneously awarded the family home to Mr. Sanderfoot and the lien to Ms. Farrey. Before the divorce decree—before the lien—Mr. Sanderfoot had at best only an undivided one-half interest in the home. In effect, Mr. Sanderfoot received Ms. Farrey's interest in the home subject to her lien against that interest. He obtained the title and the lien together. The conclusion of the district court and the Seventh Circuit that Ms. Farrey's lien somehow attached to Mr. Sanderfoot's sole interest in the home, a sole interest he never had, is in error.

The state divorce laws and the federal bankruptcy law can be reconciled fairly to stand together. The Seventh Circuit's decision, however, does not do that. Rather, it applies the statute in a way that frustrates both the intent of the federal bankruptcy law and the state divorce laws. Ms. Farrey does not ask this Court to amend the bankruptcy code:

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[24] *In re McCormick*, 18 B.R. 911 (Bankr. W.D. Pa. 1982).

> [She is] not asking [the Court] to disregard the purpose of Congress, but to fulfill it by adhering to the precise contours of the lien-avoidance section. She is asking [the Court] not to disregard Congress's words, but to apply them. She is asking not for a complex rule or vague standard but for a straightforward distinction between a judicial lien on the bankrupt's property and a judicial lien intended to secure a spouse's preexisting interest in marital property.

899 F.2d at 607, App. at 20a.

The Seventh Circuit now has told Jeanne Farrey that she has to stand in line with Mr. Sanderfoot's other unsecured creditors to await the outcome of the bankruptcy. She has been told that her 20-year contribution to the marriage, recognized by the divorce judgment, is "simply irrelevant" because it was "extinguished" by the bankruptcy code. *See id.* at 10a. The court has permitted Mr. Sanderfoot to use the bankruptcy code and the state exemptions in a way neither Congress nor the states ever intended: as a "tool by which bounders defraud their spouses" and as a means to "steal from his former wife." *Id.* at 18a, 20a. He has been allowed the fresh start intended by the bankruptcy code not only with his own property intact but with Ms. Farrey's property as well. The Seventh Circuit was wrong.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for a writ of certiorari. The conflicts that exist among the Courts of Appeals should be resolved because of the severe consequences that will persist if they are not.

Respectfully submitted,

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August 27, 1990

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

No. 88-3148

IN RE GERALD J. SANDERFOOT,
Debtor.

JEANNE FARREY, f/k/a JEANNE SANDERFOOT,
Objector-Appellant,
v.

GERALD J. SANDERFOOT,
Debtor-Appellee.

Argued Sept. 28, 1989

Decided March 30, 1990

Charles J. Hertel, David Crist, Dempsey, Magnusen, Williamson & Lampe, Oshkosh, Wis., for objector-appellant.

Harvey G. Samson, Bollenbeck, Block, Seymour, Rowland & Samson, Appleton, Wis., for debtor-appellee.

Before POSNER and RIPPLE, Circuit Judges, and ESCHBACH, Senior Circuit Judge.

RIPPLE, Circuit Judge.

Jeanne Farrey, formerly known as Jeanne Sanderfoot, appeals from the district court's order reversing the bank-

ruptcy court's determination that Gerald Sanderfoot could not avoid, pursuant to 11 U.S.C. § 522(f), a lien held by Ms. Farrey on Mr. Sanderfoot's homestead property. Because we agree with the district court that the lien is avoidable, we affirm.

I

BACKGROUND

A. *Facts*

Jeanne and Gerald Sanderfoot were married on August 12, 1966. The Wisconsin Circuit Court for Outagamie County granted a judgment of divorce and property division on September 12, 1986, and entered a written judgment of divorce on February 5, 1987. The court awarded Ms. Farrey half the refund and/or liability with respect to the couple's 1985 income taxes, certain personal property, and half the proceeds of items ordered sold at auction. The marital home, valued by the court at $104,000.00, and all remaining personal property were awarded to Mr. Sanderfoot.[1]

After all assets and debts were assigned to the parties, Ms. Farrey was left with a net estate of $1,091.90, while Mr. Sanderfoot had a net estate of $59,508.79. To achieve a more appropriate distribution, the court ordered Mr. Sanderfoot to pay Ms. Farrey $29,208.44. Mr. Sanderfoot was to pay half that amount ($14,604.22) on or before January 10, 1987; the remaining portion was due on or before April 10, 1987. To secure this debt, the court awarded Ms. Farrey a lien against the home to remain attached until the debt was paid in full.[2] Mr. Sanderfoot

[1] The court stated: "*Real Estate—House.* The Court awards the real estate—house to the Respondent herein [Gerald Sanderfoot] for $104,000.00." R. 14 Ex.B at 9.

[2] The court ordered that "[t]he Petitioner herein [Ms. Farrey] shall have a lien against the real estate property of the Respondent for the total amount of money due her pursuant to this Order of the Court, i.e. $29,208.44, and the lien shall remain attached to the real estate property of the Respondent until the total amount of money is paid in full." R.14 Ex.B at 14.

has not yet paid any part of the debt. Accordingly, Ms. Farrey has not relinquished her record title interest in the property.

Mr. Sanderfoot voluntarily filed for Chapter 7 bankruptcy on May 4, 1987, and listed the residential home on his schedule of assets. He identified the real estate as his homestead and claimed it was exempt property pursuant to Wis.Stat. § 815.20.[3]

B. *The Bankruptcy Court*

Pursuant to 11 U.S.C. § 522(f)(1),[4] Mr. Sanderfoot moved to avoid the lien against his property. Ms. Farrey

[3] Wis.Stat .§ 815.20 provides in relevant part:

Homestead exemption definition

(1) An exempt homestead as defined in s.990.01(14) selected by a resident owner and occupied by him or her shall be exempt from execution, from the lien of every judgment and from liability for the debts of the owner to the amount of $40,000, except mortgages, laborers', mechanics' and purchase money liens and taxes and except as otherwise provided. . . . The exemption extends to the interest therein of tenants in common, having a homestead thereon with the consent of the cotenants, and to any estate less than a fee.

A debtor may not exempt an amount greater than his equity in the home, even if that amount is less than $40,000. *In re Galvan*, 110 B.R. 446 (Bankr. 9th Cir.1990); H.R.Rep. No. 95-595, 95th Cong., 1st Sess. 360-61, *reprinted in* 1978 U.S.Code Cong. & Admin. News, 5787, 5963, 6316. The amount of equity a debtor has in his home is a question for the trier of fact, *see In re Galvan*, 110 B.R. 446, and that amount was not precisely determined in this case. We thus are unable to say from the record how much equity the Sanderfoots had in their home at the time of their divorce. However, the issue is immaterial to the resolution of this case. *See infra* section IIB.2.

[4] The Bankruptcy Code provides:

Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in prop-

filed her objection to the motion, claiming section 522(f)(1) could not operate to divest her of her interest in the marital home.[5] The United States Bankruptcy Court for the Eastern District of Wisconsin denied Mr. Sanderfoot's motion on March 9, 1988. The bankruptcy court applied the reasoning of *In re Boyd*, 741 F.2d 1112, 1114-15 (8th Cir. 1984), which held that a lien created by a divorce decree protects the non-debtor spouse's preexisting interest in the marital home and thus does not attach to the debtor's interest. In this case, the court determined that Mr. Sanderfoot acquired his interest in the property by virtue of the divorce decree and took that interest subject to Ms. Farrey's lien. *In re Sanderfoot*, 83 B.R. 564, 567-68 (Bankr.E.D.Wis.1988). Consequently, the court held that even though the lien impaired Mr. Sanderfoot's exemption, it could not be avoided because it did not attach to his interest in the home.

C. *The District Court*

In determining whether the requirements of section 522(f) had been satisfied, the district court concluded

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erty to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is—

(1) a judicial lien....

11 U.S.C. § 522(f).

Section 522(b)(1) allows an individual debtor to exempt from property of the estate the property listed in section 522(d)(1), which permits exemption of "[t]he debtor's aggregate interest, not to exceed $7,500 in value, in real property or personal property, that the debtor or a dependent of the debtor uses as a residence. . . ."

[5] Ms. Farrey also objected to Mr. Sanderfoot's valuation of assets in the bankruptcy proceeding and argued that he was bound by the divorce court's value determinations. The divorce court had valued the marital home at $104,000, but in his bankruptcy filings four months after entry of the divorce decree Mr. Sanderfoot listed its value at $82,750. *See In re Sanderfoot*, 83 B.R. 564, 565-66 (Bankr.E.D.Wis.1988). The bankruptcy court concluded that because Ms. Farrey's lien could not be avoided, it was "unnecessary for a finding of value to be made at this time." *Id.* at 565.

that there was "no dispute that the lien is a judicial lien that impairs Mr. Sanderfoot's homestead exemption."[6] *In re Sanderfoot*, 92 B.R. 802, 803 (E.D.Wis. 1988). The court rejected the reasoning of *Boyd* and held that the divorce decree both extinguished all preexisting interests and simultaneously created new interests. Accordingly, the bankruptcy court's order denying Mr. Sanderfoot's motion to avoid the lien under section 522(f)(1) was reversed. Ms. Farrey filed a timely notice of appeal on November 3, 1988.

II

ANALYSIS

A. *Standard of review*

The issue before the court is whether 11 U.S.C. § 522(f)(1) allows a bankruptcy debtor to avoid a lien against his homestead where the lien was granted to the debtor's former spouse under a divorce decee. There are no questions of fact. The issue is one of law, subject to *de novo* review. *See Park Terrace Townhouses v. Wilds*, 852 F.2d 1019, 1021 (7th Cir.1988); *In re Evanston Motor Co., Inc.*, 735 F.2d 1029, 1031 (7th Cir.1984).

B. *Lien avoidance under 11 U.S.C. § 522(f)*

The inquiry in this case is the proper interpretation of section 522(f)(1). Though the issue seems straightforward, courts have had "some difficulty in defining precisely the interest of an ex-spouse arising out of a property settlement made during a divorce proceeding." *In re Donahue*, 862 F.2d 259, 262 (10th Cir.1988). The issue is one of first impression in the Seventh Circuit, though this "difficulty" has led to a split among the courts of appeals that have examined the statute. *Compare In*

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[6] However, the district court neither determined the value of the residence nor the extent to which Ms. Farrey's lien impaired Mr. Sanderfoot's exemption.

re Borman, 886 F.2d 273 (10th Cir.1989) *and Boyd v. Robinson*, 741 F.2d 1112 (8th Cir.1984) *with In re Pederson*, 875 F.2d 781 (9th Cir.1989) *and Maus v. Maus*, 837 F.2d 935 (10th Cir.1988). The bankruptcy and district courts that have "wade[d] into waters muddied before [them]" are similarly divided. *In re Rittenhouse*, 103 B.R. 250, 252 (D.Kan.1989).

Interpretation of a statute must begin with the statute's plain language. *United States v. Ron Pair Enterprises, Inc.*, —— U.S. ——, 109 S.Ct. 1026, 1030, 103 L.Ed.2d 290 (1989); *United States v. Rosado*, 866 F.2d 967, 969 (7th Cir.), *cert. denied*, —— U.S. ——, 110 S.Ct. 117, 107 L.Ed.2d 79 (1989). In this case, the bankruptcy code defines most of the terms relevant to our analysis of the nature of Ms. Farrey's lien. A "lien" is a "charge against or interest in property to secure payment of a debt or performance of an obligation." 11 U.S.C. § 101(33). The parties do not contest the conclusion that Ms. Farrey has a lien as that term is defined. Rather, their disagreement arises from contrary interpretations of the application of section 522(f)(1), which allows the debtor to avoid liens if three requirements are met:

> (1) The lien is fixed on an interest of the debtor in property;
>
> (2) The lien impairs an exemption to which the debtor would otherwise be entitled; and
>
> (3) The lien is a judicial lien.

In re Sanderfoot, 92 B.R. at 803 (citing *In re Hart*, 50 B.R. 956, 960 (Bankr.D.Nev.1985)). We shall analyze each of these requirements.

1. Is the lien fixed on an interest of the debtor?

Ms. Farrey first claims that her lien does not attach to Mr. Sanderfoot's interest in his homestead. The bankruptcy court agreed with this position and found that Mr. Sanderfoot could not avoid the lien because it did not attach to his interest in the property. 83 B.R. at 568-70. The district court rejected that argument, as has the only other Wisconsin court that has examined this issue. *See In re Duncan*, 85 B.R. 80, 82 (W.D.Wis.1988) (discussed *infra*).

The Tenth Circuit noted in *Maus v. Maus*, 837 F.2d 935, 939 (10th Cir. 1988) that "[m]any courts have struggled to find theories under which a lien to enforce a property settlement survives bankruptcy." The "survival" theory that numerous courts have relied upon, including the bankruptcy court in this case, was first articulated in *Boyd v. Robinson*, 741 F.2d 1112 (8th Cir. 1984). In *Boyd*, the debtor commenced a bankruptcy action seeking to avoid her ex-husband's lien, acquired during the parties' divorce proceeding, on their former homestead. The Eighth Circuit held that liens granted by a divorce decree do not attach to an interest of the debtor, but rather protect a preexisting property right of the non-debtor spouse in the marital home arising under state law during the marriage. *Id.* at 1114-15. The court determined that applicable Minnesota law recognized the non-debtor spouse's property interest in a homestead acquired during the marriage with marital assets or assets contributed by that spouse. *Id.* at 1114. Since *Boyd*, several courts similarly have recognized the non-debtor spouse's preexisting rights in the marital home and refused to let the debtor avoid the lien.[7]

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[7] *See, e.g., In re Rittenhouse*, 103 B.R. 250 (D.Kan.1989) (divorce judgment did not terminate non-debtor spouse's interest, but created a lien to secure that interest; debtor spouse thus received interest in the homestead subject to the lien); *Zachary v. Zachary*, 99 B.R. 916, 919 (S.D.Ind.1989) (lien attaches at same time as title is transferred; debtor thus acquired properly interest subject to lien and lien did not attach to an interest of the debtor); *In re Hart*, 50 B.R. 956, 961 (Bankr.D.Nev.1985) (lien did not attach because it was created simultaneously with debtor's interest in the homestead

Other courts have declined to follow the Eighth Circuit's rationale. In *In re Pederson*, 875 F.2 781 (9th Cir. 1989), a split panel of the Ninth Circuit expressly repudiated *Boyd* and determined that a lien granted in a divorce proceeding to a non-debtor spouse against the debtor's property was subject to avoidance. The *Pederson* court rejected the Eighth Circuit's analysis that the debtor's lien attached to a preexisting interest in the property. In the Ninth Circuit's view, the state court awarded the homestead to the non-debtor spouse before imposing the lien. *Id.* at 783. The debtor spouse had an interest in the property prior to the order of dissolution, but

> "that is all it was—pre-existing. [The non-debtor's] prior interest in the house was dissolved. In its place, the court gave him a debt . . . enforceable by a lien on the house. What had been a property interest became simply collateral for a debt. Since the house was simultaneously vested solely in [the debtor spouse], the lien *must* have attached to her interest in the house, for no one else possessed any ownership interest in the house."

Id. (quoting *Boyd*, 741 F.2d at 1115 (Ross, J., dissenting) (emphasis in original)).

The Tenth Circuit also rejected the reasoning of *Boyd* in *Maus v. Maus*, 837 F.2d 935 (10th Cir.1988).[8] There, a settlement agreement incorporated in the divorce judgment awarded the debtor the marital home subject to a

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where property in effect was conveyed subject to a lien to secure payment of non-debtor spouse's settlement); *In re Seablom*, 45 B.R. 445, 451 (Bankr.D.N.D.1984) (lien created by divorce decree protected non-debtor spouse's preexisting property interest and did not attach to an interest of the debtor).

[8] *But see In re Borman*, 886 F.2d 273 (10th Cir.1989) and *In re Donahue*, 862 F.2d 259 (10th Cir.1988), discussed *infra* in subpart B, section 3, where the Tenth Circuit limited the holding of *Maus*.

lien[9] in favor of the non-debtor spouse. Because the state court awarded the debtor sole title to the home, "free and clear of any and all claims" of the non-debtor spouse, the lien[10] attached solely to the debtor's interest in the residence. *Id.* at 937, 939. The court further noted that the "convoluted theory" espoused in *Boyd* ignored the fact that "the decree gives one party title outright and that is the interest to which the lien attaches." *Id.* at 939.

Several bankruptcy and district courts have followed the rationale in *Pederson*,[11] but only one other case has focused on the avoidability of a lien created by a Wisconsin divorce court. In *In re Duncan*, 85 B.R. 80 (W.D. Wis.1988), the debtor and his wife lived on a farm owned by the debtor prior to their marriage. When the couple divorced, the debtor received the farm and the wife received a lien upon the farm to secure a cash settlement. As in the instant case, the lien was created in and by the divorce decree. *Id.* at 81. The court determined that the bankruptcy court's decision to uphold the lien directly conflicted with "the unambiguous language" of section 522 and therefore reversed. *Id.* at 82. The "plain intent"

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[9] The *Maus* court, while not explicitly deciding whether a lien technically had been created under Kansas law, held that any lien created was a judicial lien within the meaning of 11 U.S.C. § 101 (32). 837 F.2d at 938-39. Assuming that such a lien was created as a matter of state law, the court proceeded to determine whether it attached to the debtor's interest in the property within the meaning of section 522(f)(1).

[10] *See supra* note 9.

[11] *See, e.g., In re Boggess*, 105 B.R. 470, 474-75 (Bankr.S.D.Ill. 1989) (where debtor was awarded marital residence "free and clear of any interest of the [non-debtor spouse]," lien attached and was avoidable); *In re Conway*, 93 B.R. 731, 733 (Bankr.N.D.Okla.1988) (without analysis, the court concluded that the lien was fixed on the debtor's property); *In re Alvarado*, 92 B.R. 923, 926-27 (Bankr.D. Kan.1988) (court rejected the "preexisting interest" theory and held that lien attached to debtor's property).

of the divorce decree, which granted a lien upon the entire farm, was to declare the debtor the sole owner of the property, subject to his ex-wife's lien. Whether the non-debtor spouse had a preexisting interest in the farm was thus "simply irrelevant. It is plain that whatever interest she had was extinguished by the divorce decree. . . ." *Id.* The court thus rejected *Boyd* and relied on *Maus*, *Pederson*, and the dissent in *Boyd* to conclude that a lien created by a divorce decree to secure payment of a property settlement is avoidable. *Id.* at 82-83.

The facts in the case before us correspond to those in *Pederson*. Mr. Sanderfoot was awarded the marital home under the divorce decree subject to Ms. Farrey's lien. Whether she had prior rights in the residence under Wisconsin law is, in the words of the Western District of Wisconsin, "simply irrelevant." *In re Duncan*, 85 B.R. at 82. Any preexisting interest Ms. Farrey had in the homestead was dissolved in the divorce proceeding. Her new interest, created in the dissolution order and evidenced by her lien, attached to Mr. Sanderfoot's interest in the property. Like the Ninth Circuit, we therefore respectfully decline to follow *Boyd*. We conclude that *Pederson* and its progeny are better reasoned and faithful to the plain language of section 522(f).[12] Consequently, we conclude that Ms. Farrey's lien attached to Mr. Sanderfoot's interest in the homestead property.

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[12] Although mindful of our responsibility to review the issue *de novo*, "we accord great weight to the determination of the district court sitting in the state whose law is to be applied." *PPG Indus., Inc. v. Russell*, 887 F.2d 820, 823 (7th Cir.1989). To the extent Wisconsin family law is relevant to the interpretation of the divorce decree and lien, the Eastern and Western districts of Wisconsin, in this case and *In re Duncan*, respectively, have interpreted similar divorce decrees and determined that the liens created in each attached to and were "fixed on an interest of the debtor." *See* 11 U.S.C. § 522(f).

2. Does the lien impair an exemption to which debtor is entitled?

The parties do not dispute that the real estate at issue constitutes Mr. Sanderfoot's homestead under Wis.Stat. § 815.20 and that he thus was entitled to exempt the property from his bankruptcy estate. *See* Appellant's Br. at 6. The question is whether Ms. Farrey's lien impairs that exemption. Neither the parties nor the courts below focus on this aspect of the lien avoidance statute. With little discussion, the bankruptcy court determined that the lien impaired Mr. Sanderfoot's homestead exemption, 83 B.R. at 566-67, and the district court stated that the parties did not dispute the issue, 92 B.R. at 803. Indeed, Ms. Farrey did not address this point in either her brief or at oral argument. Accordingly, we conclude that any challenge has been waived and affirm the determination that the lien impairs the debtor's interest in his homestead property. We must leave it to the bankruptcy court to determine in the first instance the value of Mr. Sanderfoot's homestead, and thus the exemption amount to which he is entitled.[13]

3. Is the lien a judicial lien?

Under the Bankruptcy Code, a judicial lien is defined as a "lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding." 11 U.S.C. § 101(32). Applying the plain language of the statute, there can be no doubt that Ms. Farrey's lien, granted by the Wisconsin Circuit Court for Outagamie County, was obtained by "legal proceedings." The bankrupcty court,

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[13] The divorce court valued the homestead at $104 000. Ms. Farrey objected to Mr. Sanderfoot's valuation of $82,750 in his Chapter 7 petition. Neither the bankruptcy nor district court settled this issue. However, they are not bound by the valuations determined in the divorce proceedings. *See In re Boggess*, 105 B.R. 470, 474 (Bankr. S.D.Ill.1989); *In re Sanderfoot*, 83 B.R. 564, 570-71 (Bankr.E.D. Wis.1988); 3 *Collier on Bankruptcy* § 521.08[2] (15th ed. 1989).

although concluding that Ms. Farrey's lien could not be avoided, yet conceded that the lien "is without question a type of judicial lien." 83 B.R. at 566. The district court similarly determined that "the lien is a judicial lien that impairs Mr. Sanderfoot's homestead exemption." 92 B.R. at 803. Ms. Farrey nonetheless maintains that the lien imposed by the divorce court is not a judicial lien. Therefore, we turn to an examination of her argument.

The same year the Tenth Circuit handed down *Maus v. Maus*, 837 F.2d 935 (10th Cir.1988), that court decided *In re Donahue*, 862 F.2d 259 (10th Cir.1988). The dispute in the *Donahue* case centered around the terms of a divorce decree pursuant to which the debtor received the marital residence "subject to" a money judgment awarded to the non-debtor spouse. 862 F.2d at 260. The *Donahue* panel determined that the decree created an equitable lien. *Id.* at 262-63. The court distinguished *Maus:*

> The critical difference between this case and *Maus* is that the terms of the divorce decree in *Maus* explicitly awarded the property to the debtor spouse "free and clear" of any claims of the nondebtor sponse. In our case, by contrast, the divorce decree itself clearly contemplated the creation of a lien or security interest of some kind in favor of [the non-debtor spouse] and against the Property.

Id. at 265.

The Tenth Circuit subsequently relied on *In re Donahue* to limit the holding of *Maus* and declare that a lien in favor of the debtor's former spouse against the debtor's homestead could not be avoided. *In re Borman*, 886 F.2d 273 (10th Cir.1989). The panel explicitly stated that *Maus* was "limited to the issue of whether a money judgment awarded in a divorce decree can give rise to a lien on homestead property when the divorce decree itself does not specifically create a lien." *Id.* at 274. Because the debtor in *Borman* would have been unjustly enriched if allowed to avoid a lien created by the dissolution order,

the court imposed an equitable lien and refused to permit its avoidance. *Id.*

While other courts have echoed a similar rationale,[14] such reasoning is clearly incompatible with the reasoning of *In re Pederson* that rejected as "implausible and unsupported by the language of the Code" theories advanced by bankruptcy courts for "salvaging liens enforcing property settlements." 875 F.2d at 783 n. 4.[15] Finally, the

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[14] In *In re Davis*, 96 B.R. 1021, 1022 (M.D.Fla.1989), for example, the court concluded that the final judgment entered by the divorce court recognized an already existing equitable lien. *See also Zachary v. Zachary*, 99 B.R. 916, 920 (S.D.Ind.1989) (lien was not one "obtained by judgment" because lien merely recognized preexisting property right in homestead); *In re Warren*, 91 B.R. 930, 931 (Bankr.D.Or.1988) (lien which simply recognizes preexisting interest in marital property is not judicial lien). Similarly, in *In re Worth*, 100 B.R. 834, 840 (Bankr.N.D.Tex.1989), the court examined Texas law and concluded that a lien imposed by the divorce court was an unavoidable vendor's lien. *See also In re Boyd*, 93 B.R. 538, 539-40 (Bankr.S.D.Tex.1988) (non-debtor spouse held valid implied vendor's lien against the homestead where divorce decree awarded home to debtor subject to second lien in facor of non-debtor spouse; § 522 (f) question not reached because debtor did not seek to avoid lien); *In re Hart*, 50 B.R. 956, 960-61 (Bankr.D.Nev.1985) (non-debtor spouse had unavoidable equitable lien securing his equity in debtor's property); *In re Thomas*, 32 B.R. 11, 12 (Bankr.D.Or.1983) (lien imposed by dissolution decree intending to effect a division of property is not avoidable judicial lien). An analogous theory is that the divorce court created a security interest or mortgage rather than an avoidable judicial lien. *See In re McCormmach*, 111 B.R. 330 (Bankr.D.Or.1990) (consensual mortgage or homestead incorporated into divorce decree was not a judicial lien); *In re Conway*, 93 B.R. 731, 733-34 (Bankr.N.D.Okla.1988) (lien conferred in divorce judgment "is more in the nature of a security interest or a mortgage and thus is not a mere judicial lien"); *Wozniak v. Wozniak*, 121 Wis.2d 330, 359 N.W.2d 147 (Wis.1984) (proceeding under state law rather than the bankruptcy code, court concluded that divorce judge clearly intended to create security interest).

[15] *In re Godfrey*, 102 B.R. 769, 773 (Bankr. 9th Cir.1989), relying on *In re Pederson*, concluded that a lien on real property arising from marriage dissolution is an avoidable judicial lien under § 522(f)(1).

dissent in *Boyd* concluded that the state court gave the nondebtor spouse a judicial lien, as opposed to an equitable mortgage or security interest, in the debtor's residence.[16] 741 F.2d 1112, 1115 and n. 1 (8th Cir.1984) (Ross, J., dissenting). Judge Ross noted that the lien granted by the divorce court fit "precisely" within the definition in section 101(32); the lien was obtained by judgment because the non-debtor spouse had no interest or lien on the house until the divorce court's order. *Id.* at 1115-16. Moreover, the lien was not created by an agreement, so did not constitute a security interest. Nor was it created by contract or conveyance. It was imposed by the court, so could not be termed a mortgage. *Id.* at 1116.[17]

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[16] The majority did not consider whether the non-debtor spouse had a judicial lien.

[17] Following the dissent in *Boyd*, the Western District of Wisconsin also found "unpersuasive" the argument that the divorce court awarded the non-debtor spouse an equitable mortgage or other non-judicial lien. *In re Duncan*, 85 B.R. 80, 82-83 (W.D.Wis.1988). Because the lien in *Duncan* was created in a disputed divorce proceeding, and not by agreement, it could not be a security interest as that term is defined by 11 U.S.C. § 101(45). *Id.* at 83. Moreover, "[t]he fact that the Wisconsin state court [in *Wozniak v. Woznaik*, 121 Wis.2d 330, 359 N.W.2d 147, 150 (Wis.1984)] has held that such a lien is to be foreclosed under the mortgage statutes is irrelevant," given the resulting chaos should state courts be permitted to alter what would clearly be a judicial lien by terming it an '"equitable mortgage.'" *Id.* (quoting *In re Boyd*, 741 F.2d at 1115 (Ross, J., dissenting)).

Bankruptcy courts have repeated this reasoning in their decisions. Under the clear language of the Code, the court in *In re Boggess*, 105 B.R. 470, 474-75 (Bankr.S.D.Ill.1989), held that the lien arising from the divorce proceeding fit the statutory definition of "judicial lien." The court in *In re Brothers*, 100 B.R. 565, 567-68 (Bankr. N.D.Ala.1989), a case factually comparable to the one before us, also concluded that the non-debtor spouse possessed an avoidable judicial lien as defined by the unambiguous terms of the Code. *See also In re Alvarado*, 92 B.R. 923, 925 (Bankr.D.Kan.1988) (lien created by divorce decree is judicial lien, not "consensual" lien). In

We conclude that, whether liens of the type at issue in this case are called equitable liens or vendor's liens or security interests, they still are "judicial liens" within the definition of section 101(32) and, consequently, are within the embrace of section 522(f)(1). The federal definition of "judicial lien," 11 U.S.C. 101(32), is unambiguous and must control in this instance. *See McKenzie v. Irving Trust Co.*, 323 U.S. 365, 369-70, 65 S.Ct. 405, 407-08, 89 L.Ed. 305 (1945). Like the court in *In re Boggess*, we find the rationale employed in *Boyd* and its progeny "strained and instead adopt the position of the *Pederson* line of cases that the Code provisions must be given their plain meaning despite the seemingly inequitable results in a divorce setting." 105 B.R. 470, 474 (Bankr.S.D.Ill.1989). "Regardless of its own perceptions of fairness, [this] Court must give effect to the policy decisions embodied in the express language of Code provisions," *id.* at 475, for as Judge Ross concluded in his dissent, "[i]f state law were allowed to vary what would otherwise be a judicial lien by merely calling the interest an 'equitable mortgage,' havoc would result." *In re Boyd*, 741 F.2d at 1115. In this case, the lien imposed by the Outagamie County circuit court is a judicial lien as defined in the Code. It was created by a judgment and it is a "charge against" the property awarded to Mr. Sanderfoot and is designed to secure payment of the $29,000 debt owed to Ms. Farrey. We thus conclude that the definition of § 101(32) is satisfied and the lien is in fact a judicial lien.

Conclusion

There are unquestionably a number of opposing interests involved in cases like this one. The court in *In re*

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yet another case analogous to the one before us, a Florida bankruptcy court declared that "[t]here is no question that an equitable lien is 'a judicial lien' and, therefore, within the scope of § 522(f)(1)." *In re Dudley*, 68 B.R. 426, 427 (Bankr.S.D.Fla.1986).

Worth, 100 B.R. 834, 837 (Bankr.N.D.Tex.1989), noted that it is not uncommon for divorce courts to award exempt property to Spouse A and create a lien on the property in favor of Spouse B. However,

> [i]f Spouse A subsequently files for bankruptcy and seeks to avoid the lien, bankruptcy courts are presented with substantial legal and policy conflicts. On one side stands the Congressional mandate that debts for property division are dischargeable in bankruptcy, and judicial liens on exempt property are avoidable pursuant to § 522(f)(1). Ranged on the opposite side are the federal judiciary's respect for the judgments of state courts, the feeling that a debtor (although deserving a fresh start) should not profit from a bankruptcy proceeding, and the concern that Spouse B's future earning ability may not be as great as that of Spouse A.

Id. (footnote omitted). The court concluded that "[w]hen faced with these disparate issues, it is not surprising that courts have reached different conclusions." *Id.*

We recognize the policy arguments against avoidance, but emphasize that it is not for the courts to make policy: "permitting avoidance of this lien" may be "a harsh result," but "[t]his type of decision is for Congress. Once Congress has decided, its judgment should be respected." *In re Boyd*, 741 F.2d 1112, 1116 (8th Cir.1984) (Ross, J., dissenting). Ms. Farrey urges this court to render a convoluted reading of section 522(f)(1), given the claimed inequitable result if the statute is read literally. While we might have struck a different balance than did Congress, we are not free to disregard the clear legislative judgment that debtors may avoid judicial liens of the type at issue. Perhaps Congress should reexamine the statute, but until it is amended, this court is constrained to apply the law as plainly written. We therefore decline

to follow one of the various routes taken in an effort to prevent "injustice" suggested by *Boyd* and its progeny because we agree that "the policy considerations at issue have been weighed by Congress and embodied in the language of the Bankruptcy Act. It is the prerogative of Congress and not of the courts to adjust that balance." *Maus v. Maus*, 837 F.2d 935, 940 (10th Cir.1988). Because it is clear from the face of the statute that Ms. Farrey has a judicial lien that impairs Mr. Sanderfoot's homestead exemption, we conclude that the lien is avoidable under section 522(f)(1).

Ms. Farrey's lien is fixed on Mr. Sanderfoot's interest in his home, impairs an otherwise proper homestead exemption, and was obtained through the judicial process. All the elements of section 522(f)(1) are satisfied, and we therefore affirm the district court's determination that the lien is avoidable.

AFFIRMED.

POSNER, Circuit Judge, dissenting.

The fact that a judicial decision offends the moral sense of laymen does not prove the decision wrong. Institutional or systemic considerations, themselves morally significant, but invisible to the laity, may outweigh the tug of simple justice. But they do not do so here.

The divorce court found that the net value of the Sanderfoots' marital property, consisting primarily of the couple's home, was $58,000 and that the property should be split 50-50. No one questions that this is the proper division. To effect the split, the court awarded to the husband the couple's home, which had been bought during the marriage and was jointly owned, and ordered him to pay $29,000 in cash to the wife. To enforce this order, the court gave her a lien on the house. The husband did not pay his wife a cent (nor did he comply with any other order of the divorce court, including an order to

provide child support), but instead declared bankruptcy, claimed a homestead exemption for the house, and filed a motion under 11 U.S.C. § 522(f) to avoid the wife's lien—a tactic designed to nullify (or perhaps to complete the nullification of) the divorce decree and give the husband all rather than half the marital property. Today we place the crown of success on this vicious scheme. The Bankruptcy Code as liberalized in 1978 is widely criticized as making bankruptcy an ordinary tool of business planning, but after today it will also be criticized as a tool by which bounders defraud their spouses.

This result, a perversion of bankruptcy law, is a product neither of judicial hardheartedness nor of legislative ineptitude, but of judicial misunderstanding of the lien-avoidance provision of the Bankruptcy Code. Section 522(f)(1) allows the debtor (i.e., the bankrupt) to avoid a judicial lien that impairs an exemption. The purpose—as appears unmistakably from legislative history the purport and significance of which are unquestioned—is to thwart unsecured creditors who, sensing impending bankruptcy, rush into court to obtain liens on exempt property, thus frustrating the purpose of the exemptions. As explained in H.R.Rep. No. 595, 95th Cong., 1st Sess. 126 (1977), the lien-avoidance provision "allows the debtor to undo the actions of creditors that bring legal action against the debtor shortly before bankruptcy. Bankruptcy exists to provide relief for an over-burdened debtor. If a creditor beats the debtor into court, the debtor is nevertheless entitled to his exemptions." That is not what happened here. No creditor beat the debtor into court. The lien was created by a court, it is true, but not to enable a creditor to defeat his debtor's household exemption; it was done to protect a spouse's preexisting property rights.

Of course often the language of a statute carries beyond the statutory purpose, and when that happens subtle issues of interpretation arise. This may seem to

be such a case, because the lien was created by a court and was therefore a "judicial lien." But the statute does not say that the bankrupt may avoid a judicial lien to the extent that it impairs an exemption; it says that the bankrupt may avoid "the fixing of" such a lien "on an interest of the debtor in property." The debtor must have the interest at the time the court places the lien on it. That condition is not satisfied here. Before the divorce, the Sanderfoots owned their home jointly. Wis. Stat. §§ 766.31, 767.255; *Krueger v. Wisconsin Department of Revenue*, 124 Wis.2d 453, 460, 369 N.W.2d 691, 694-95 (1985). Mr. Sanderfoot did not own it. Certainly he did not own it free and clear of his wife's interest, which was equal to his own. He could not have sold it without her consent, whether or not her name appeared on the title papers. Wis.Stat. § 706.09(1)(e). The divorce court did not extinguish her interest, but instead transformed it from that of a co-owner to that of a mortgagee. *Wozniak v. Wozniak*, 121 Wis.2d 330, 359 N.W.2d 147 (1984).

It is settled in the nonfamily context that a debtor cannot avoid a lien on an interest acquired after the lien attached. *In re McCormick*, 18 B.R. 911 (Bankr.W.D.Pa. 1982); *In re Stephens*, 15 B.R. 485 (Bankr.W.D.N.C. 1981). The principle should be the same if the interest and lien arise from the same transaction, here a divorce decree that gave the entire property to Sanderfoot subject to a lien in favor of his wife. It cannot be argued that enforcing the lien would diminish the amount available to creditors who extended credit to the debtor before the lien attached, or to the debtor himself claiming an exemption. Before the wife acquired her lien, Sanderfoot had only an undivided one-half interest in the property. Enforcing the wife's lien cannot cut down on the size of the bankrupt estate as it existed before the lien attached.

I am at a loss to understand why we should strain the language and ignore the purpose of the lien-avoidance

statute in order to achieve a result that does not promote, but instead denies, simple justice—layman's justice. I do not expect an argument about this characterization of our result, because at oral argument the husband's lawyer admitted that his client's action had subverted the purpose of the divorce decree. The lawyer added, however, that this did not matter because (in his words) "bankruptcy is inequitable." I had thought bankruptcy a branch rather than a rejection of equity. In so saying I do not endorse a free-wheeling judicial discretion to disregard either the Bankruptcy Code or the state-law entitlements that the Code is largely concerned with enforcing. "[E]quity may supplement, but may never supersede, the [Bankruptcy] Act." *Marin v. England*, 385 U.S. 99, 110, 87 S.Ct. 274, 280, 17 L.Ed.2d 197 (1966) (Harlan, J., dissenting). See also *Boston & Maine Corp. v. Chicago Pacific Corp.*, 785 F.2d 562, 566 (7th Cir. 1986); *Levit v. Ingersoll Rand Financial Corp.*, 874 F.2d 1186, 1197-98. But when a debtor uses the Code to steal from his former wife we should not lightly conclude that the Code, properly read, commands such a result.

I acknowledged at the outset of this opinion, and I repeat, that superficially unjust results are sometimes made just by institutional and systemic concerns, such as the desirability of simple rules. If this were not so, there would never be a tension between legal justice and substantive justice. But there is no such tension *here*. Mrs. Sanderfoot is not asking us to disregard the purpose of Congress, but to fulfill it by adhering to the precise contours of the lien-avoidance section. She is asking us not to disregard Congress's words, but to apply them. She is asking not for a complex rule or vague standard but for a straightforward distinction between a judicial lien on the bankrupt's property and a judicial lien intended to secure a spouse's preexisting interest in marital property. We could do justice here without deforming the Bankruptcy Code.

Precedent does not compel the court's result. Far from it. The position I urge here was adopted by the Eighth Circuit in *Boyd v. Robinson*, 741 F.2d 1112 (8th Cir. 1984), as it has been by most bankruptcy judges. *In re Thomas*, 32 B.R. 11 (Bankr.D.Ore.1983); *In re Williams*, 38 B.R. 224 (Bankr.N.D.Okla.1984); *In re Scott*, 12 B.R. 613 (Bankr.W.D.Okla.1981). The Tenth Circuit rejected it in *Maus v. Maus*, 837 F.2d 935 (10th Cir.1988). But *In re Donahue*, 862 F.2d 259 (10th Cir.1988), decided a few months later, and *In re Borman*, 886 F.2d 273 (10th Cir.1989), repudiated *Maus* in the guise of distinguishing it. In *In re Pederson*, 875 F.2d 781 (9th Cir. 1989), the Ninth Circuit lined up with *Maus*. It reasoned (as had the dissenting judge in *Boyd*) that when the divorce court awarded the home to one spouse, it dissolved the other spouse's interest and created in that spouse a new interest, a judicial lien the fixing of which the bankrupt was entitled to avoid to the extent it impaired an exemption. I do not doubt that the decree can be so characterized, but I disagree that the characterization supports a conclusion that the spouse's lien is avoidable. The lien in our case was created in the same document—the divorce decree—that gave the husband his interest in the property. The lien qualified that interest from the start. There was no instant at which Sanderfoot owned the property free and clear of the wife's interest. He seeks a fresh start with someone else's property.

We should go with the Eighth and Tenth Circuits. We should reverse.

UNITED STATES DISTRICT COURT
E.D. WISCONSIN

No. 88-C-373

Bankruptcy No. 87-02046

IN RE GERALD J. SANDERFOOT,
Debtor-Appellant.

Oct. 4, 1988

Harvey G. Sampson, Appleton, Wis., for plaintiff.

Charles J. Hertel, Dempsey, Magnusen, Williamson & Lampe, Neenah, Wis., for defendant.

DECISION AND ORDER

MYRON L. GORDON, Senior District Judge.

Gerald Sanderfoot, a debtor in bankruptcy, sought to avoid a lien pursuant to 11 U.S.C. § 522(f). The bankruptcy court held that the lien was not avoidable, 83 B.R. 564; Mr. Sanderfoot appeals. The order of the bankruptcy court will be reversed.

The only issue before this court is an issue of law and, therefore, subject to de novo review by this court on appeal. *In Re Duncan*, 85 B.R. 80, 82 (W.D.Wis.1988), citing, *In Re Evanston Motor Co. Inc.*, 735 F.2d 1029, 1031 (7th Cir.1984). The issue on review is whether a debtor may, pursuant to 11 U.S.C. § 522(f), avoid a lien on his homestead arising from the contested property division in a divorce proceeding.

A lien may be avoided under 11 U.S.C. § 522(f)(1) if three requirements are met:

> (1) The lien is fixed on an interest of the debtor in property;
>
> (2) The lien impairs an exemption to which the debtor would otherwise be entitled; and
>
> (3) The lien is a judicial lien.

In Re Hart, 50 B.R. 956, 960 (Bkrtcy.D.Nev.1985).

In the case at bar, there is no dispute that the lien is a judicial lien that impairs Mr. Sanderfoot's homestead exemption. Objection has been made to Judge McGarity's decision that the lien is not fixed upon a property interest of Mr. Sanderfoot. In arriving at that conclusion, Judge McGarity fully analyzed the Wisconsin law on the impact of divorce with regard to liens on real estate. Thereupon, the bankruptcy court followed the reasoning outlined in *Boyd v. Robinson*, 741 F.2d 1112 (8th Cir. 1984), which represents one branch of thought on this type of lien avoidance. However, other courts of appeals have rejected *Boyd*. *Maus v. Maus*, 837 F.2d 935 (10th Cir. 1988), *see also Pederson v. Stedman*, 78 B.R. 264 (9th Cir. BAP 1987). The issue in this case has not been addressed by the court of appeals for the seventh circuit. However, the district court for the western district of Wisconsin did confront the identical issue and rejected the reasoning of *Boyd*. *In Re Duncan*, 85 B.R. 80 (W.D. Wis.1988).

Like Judge Shabaz, I discredit the reasoning in *Boyd*. The theory announced in *Boyd* and followed by Judge McGarity is that the lien does not attach to the property of the debtor, but rather, it attaches to the pre-existing interest of the non-debtor spouse; therefore, the debtor takes the property subject to an unavoidable lien. "The problem with this convoluted theory is that, as the dissent in *Boyd* points out, 741 F.2d at 1112, the decree gives one party title outright and that is the interest to which

the lien attaches." *Maus v. Maus*, 837 F.2d 935, 939 (10th Cir.1988).

I am unable to adopt the theory that the debtor acquired the property subject to a lien. Whatever preexisting interests the parties had were extinguished by the divorce decree. New interests were simultaneously created: title in the homestead was given to Mr. Sanderfoot, and Mrs. Sanderfoot acquired a lien on that property. Now that Mr. Sanderfoot is in bankruptcy, the Bankruptcy Code provides that he may avoid Mrs. Sanderfoot's lien pursuant to § 522(f)(1) because he has met all of the statutory requirements of that section.

Therefore IT IS ORDERED that the order denying the debtor's motion under § 522(f)(1) be and hereby is reversed.

UNITED STATES BANKRUPTCY COURT
E.D. WISCONSIN

Bankruptcy No. 87-02046

IN RE GERALD J. SANDERFOOT, GERALD SANDERFOOT, GERALD SANDERFOOT, f/d/b/a IMPROVEMENTS UNLIMITED and d/b/a RAGUN'S BAR,
Debtor(s).

March 9, 1988

Harvey G. Samson, Bollenbeck, Block, Seymour, Rowland & Samson, S.C., Appleton, Wis., for petitioner.

Charles J. Hertel, Dempsey, Magnusen, Williamson & Lampe, Oshkosh, Wis., for respondent.

DECISION

M. DEE McGARITY, Bankruptcy Judge.

This case comes before the court on an objection to the debtor's motion for lien avoidance under 11 U.S.C. § 522(f)(1). A decree of divorce entered by a Wisconsin state court granted the debtor's ex-spouse a lien on the debtor's residence to secure payment to the ex-spouse of her portion of the property division. The debtor is seeking to avoid this lien under § 522(f)(1) as impairing his homestead exemption. For the reasons set forth below, the debtor's motion for lien avoidance under § 522(f)(1) will be denied.

The debtor's former spouse has also objected to the debtor's valuation of assets in this bankruptcy and argues

that the debtor is bound by the determinations of value in their divorce. The court now determines that it is not bound by those values, but in view of its ruling on the debtor's motion, it is unnecessary for a finding of value to be made at this time.

FACTS

Gerald J. Sanderfoot, the debtor, and Jeanne Farrey Sanderfoot were divorced on February 5, 1987. There was no agreement of the parties as to any provision of the division of property, maintenance or child support, and a trial was held on all issues. In the decree of divorce the state court found the couple owned property including approximately 27 acres of land with the couple's residence on it valued at $104,000. In addition, there was a business, Ragun's Bar, two cars, a tractor, trailer and numerous items of personal property.

Certain personal property was ordered turned over to the debtor's ex-spouse or sold at auction. The debtor was awarded title to all of the parties' remaining property, including house, land, both cars and the business together with responsibility for its attendant liabilities. In return for her interest in that property, the wife was awarded $29,208.44 in cash, amounting to approximately one-half of the net estate, payable in two equal installments on January 10, 1987, and April 10, 1987. To secure this payment, the court ordered that a lien in her favor be placed on the marital residence. In addition, the decree provided that the debtor pay child support, maintenance to his ex-spouse and attorney fees.

The record in this court shows that up until the time Mrs. Sanderfoot applied for a relief from stay, the debtor had not complied with a single order of the state court. He had not conducted the auction, delivered the personal property to his ex-wife, or made a single payment toward child support, maintenance or attorney fees. He had not made the cash payments that were ordered by the court

to be made to his ex-wife as compensation for her interest in the property.

Four months after entry of the decree of divorce, the debtor filed a Chapter 7 bankruptcy. Claiming that it impaired his homestead exemption in the property, he then moved pursuant to 11 U.S.C. § 522(f)(1) to avoid the lien given to his wife on the marital residence.[1] He listed the value of the residence at $82,750 in contrast to the $104,000 which was found by the state court to be the value of that property. The parties later stipulated to an independent appraisal of the property. It was appraised at $95,000, but there was no agreement to accept the appraiser's valuation.

The parties agree that the following are the only issues in contention: Whether the debtor may, pursuant to 11 U.S.C. § 522(f)(1), avoid a lien arising from the contested property division in his divorce proceeding, and whether the debtor is bound by the findings of the divorce court regarding the valuation of assets.

DECISION

The debtor argues that because property division payments are dischargeable under 11 U.S.C. § 523, he should be able to avoid the lien on his homestead. Such payments are indeed dischargeable, but this serves only to relieve the debtor of personal liability. The lien on the residence securing these payments will nevertheless remain in force unless it can be avoided under § 522(f)(1) or another Code provision. *In re Williams*, 38 B.R. 224, 226-27

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[1] (f) Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is—

(1) a judicial lien; . . .

11 U.S.C. § 522(f)(1)

(Bkrtcy.N.D.Okl.1984). The court first addresses that issue.

Lien Avoidance

Before any lien may be avoided under § 522(f)(1), the debtor must prove three elements:

1. The lien is fixed on an interest of the debtor in property;
2. The lien impairs an exemption to which the debtor would otherwise be entitled; and
3. The lien is a judicial lien.

In re Hart, 50 B.R. 956, 960 (Bkrtcy.D.Nev.1985); *In re Thomas*, 32 B.R. 11, 12 (Bkrtcy.D.C. 1983).

The lien this debtor seeks to avoid is not of the type that Congress intended to address by § 522(f)(1).

> Congress intended by § 522(f)(1) to allow the removal of judicial liens obtained by creditors on a debtor's exempt property. ". . . the bill gives the debtor certain rights not available under current law with respect to exempt property. The debtor may avoid any judicial lien on exempt property . . . (This, right allows the debtor to undo the actions of creditors that bring legal action against the debtor shortly before bankruptcy. Bankruptcy exists to provide relief for an overburdened debtor. If the creditor beats the debtor into court, the debtor is nevertheless entitled to his exemptions . . ." House Report 95-595, 95th Cong., 1st Sess., 1977, p. 126, U.S.Code Cong. & Admin.News, 1978, pp. 5787, 6087.

In re Thomas, *supra*, at 12.

This legislative history makes clear that the policy behind 11 U.S.C. § 522(f)(1) was not to circumvent a divorce court's decision by allowing one spouse to acquire substantially all of the predivorce assets to the exclusion of the other. Mr. Sanderfoot is attempting to manipulate bankruptcy law for this very purpose, and to permit such a result would be inequitable and contrary to public policy. However, in addition to policy grounds, there are legal grounds for denying avoidance of the lien.

Mrs. Sanderfoot's lien is without question a type of judicial lien. 11 U.S.C. § 101(32). *But see Wozniak v. Wozniak*, 121 Wis.2d 330, 359 N.W.2d 147 (1984), which characterized such a lien as a mortgage. Furthermore, even if the $104,000 value found by the divorce court is used, as she has argued, and the amount of the first and second mortgages ($37,490 and $9,935, respectively) is deducted, the lien impairs the debtor's homestead exemption.

Section 522(f) permits avoidance of the "*fixing* of a lien on an *interest* of the debtor." The statute uses the word "fixing" instead of "fixed;" "interest" instead of "property." The implication of the House Report and this language in § 522(f) is that Congress intended the avoidance of liens that became fixed after the debtor's acquisition of the interest in property, not before. *In re Williams*, 38 B.R. 224, 226-27 (Bkrtcy.N.D.Okl.1984); *Thomas*, *supra*, at 12. More explicitly, § 522(f) provides that "a judicial lien which attached to an interest in property prior to the debtor's acquisition of that interest is not avoidable" pursuant to § 522(f) inasmuch as "the phrase 'an interest of the debtor in property' refers to an unencumbered interest at the time of acquisition." *Williams*, *supra*, at 228, quoting from *In re McCormick*, 18 B.R. 911 (Bkrtcy.W.D.Pa.1982).

As stated in *Williams*:

> [i]t is clear that a lien imposed by a divorce decree does not even remotely resemble the scenario presented here, [where creditors rush to turn their unsecured claims into judicial liens before the debtor can file bankruptcy] which presupposes the existence of a property interest in the debtor *before* the attach-

ment of a judicial lien to that interest. (emphasis original)

Id. at 227-28.

In a divorce proceeding, the document which conveys one spouse's interest in the homestead to the other spouse simultaneously creates a lien in favor of the spouse who will no longer be allowed to live in the residence. In effect, the property is conveyed to the debtor subject to a lien to secure payment of the nonresident spouse's share of the property settlement. *Thomas, supra.* As such, the debtor's property interest is an "interest of the debtor in property" which was not owned by him before it was conveyed to him with the judicial lien attached. A lien of this kind, whether or not the creditor is an ex-spouse, may not be avoided. *McCormick, supra.* (Debtor acquired her interest in property after the creditor's lien attached. Since she received it subject to the lien, it was unavoidable under § 522(f).)

This issue has not yet been decided at the appellate level in the 7th Circuit. The Court of Appeals of the 8th and 10th Circuits and the Bankruptcy Appellate Panel of the 9th Circuit have considered it but reached inconsistent results. In *Boyd v. Robinson*, 741 F.2d 1112 (8th Cir.1984), the bankruptcy court found that a lien imposed by a divorce decree could be avoided as a judicial lien if the lien was the result of a contest as opposed to an agreement between the parties. The district court reversed, and the 8th Circuit Court of Appeals affirmed the district court. The Court of Appeals held that the lien in question protected the debtor's ex-spouse's "pre-existing" property right in the marital residence arising under state law during the marriage. *Id.* at 1115.

In *Boyd v. Robinson*, the wife had owned the homestead prior to marriage and had continued to hold the property in her own name following marriage. The court analyzed Minnesota law to determine whether the nondebtor husband had acquired an interest in the homestead prior to the divorce. Minnesota law restricts conveyance of a homestead without a spouse's consent and provides for an inchoate right upon the death of the owner spouse during marriage. The court noted that the nondebtor had contributed to the mortgage and improvements on the house and that the value of the equity in the house was divided equally in the divorce according to Minnesota's statute providing for equitable division of property at divorce. In addition, Minnesota's definition of a "mortgage" includes the interest created by a divorce decree. In view of the foregoing, the court concluded that the lien attached to the nondebtor's property at the time it was conveyed to him by the divorce decree, and that it did not attach to the debtor's interest. Consequently, the lien was not avoidable under 11 U.S.C. § 522(f). *Id.* at 1114-15.

In the case at bar, it is not clear from the record whether the parties owned the homestead as joint tenants or tenants in common before the divorce, or whether it was always in Mr. Sanderfoot's name only. If Mrs. Sanderfoot was a co-owner and the divorce judgment conveyed her interest to the debtor, Mr. Sanderfoot took the property subject to her lien. In that event, the lien did not attach to the interest of the debtor, and it is not avoidable under 11 U.S.C. § 522(f)(1).

However, whether or not Mrs. Sanderfoot held title prior to the divorce is not determinative of this case. Applying the reasoning of *Boyd v. Robinson*, Mrs. Sanderfoot had an interest in the homestead even if it was in Mr. Sanderfoot's name at all times prior to the divorce. Wisconsin law as well as Minnesota law provides for an equitable property division at divorce. Wis.Stat. § 767.255. With the exception of property acquired by gift or inheritance (which is only divided upon a finding of hardship), all property owned by either spouse at the time of divorce is presumed to be divided equally, al-

though the court may deviate from an equal division based on equitable considerations set forth in the statute. *Id.* In this case the divorce court found no reason to alter these presumptions, and it divided the Sanderfoots' net estate equally.

The Wisconsin Supreme Court has analyzed Wisconsin's divorce law as creating a "species of common ownership" tantamount to an interest in property arising during the marriage, regardless of how property is titled or owned. *Krueger v. Wisconsin Department of Revenue*, 124 Wis.2d 453, 460, 369 N.W.2d 691, 694 (1985). Like Minnesota, Wisconsin requires a nontitled spouse's consent to convey a homestead (Wis.Stat. § 706.09(1)(e)) and preserves a surviving spouse's rights in property at the death of the other spouse. *See* Wis.Stat. §§ 851.55 (3m), 861.02, .03. Unlike Minnesota, Wisconsin does not have a statute defining this type of lien as a mortgage, but state case law accomplishes the same result. Where one party in a divorce action is granted an interest in specific real property subject to a lien of the other party in the same property to secure payment of a sum of money, under Wisconsin law, that lien is a mortgage. *Wozniak v. Wozniak, supra.*

The court in *Wozniak* distinguished a lien granted by the divorce court on specific property from a judgment lien which, under Wis.Stat. § 806.15, creates a general lien on all real estate of the debtor. The court concluded that the divorce court had created a mortgage lien and not a judicial lien. *Id.*, 121 Wis.2d at 336, 359 N.W.2d 147.

Finally, Wisconsin's enactment of the Marital Property Act, effective January 1, 1986, gave spouses an equal ownership interest in property earned or acquired during the marriage and after the determination date (the date from which the Act applies to a married couple, Wis. Stat. § 766.01(5)). Wis.Stat. § 766.31. Since the parties

remained married for over a year after the Act became effective, it is likely that improvements or mortgage payments during the year were made with marital property and that Mrs. Sanderfoot thereby acquired an ownership interest. Wis.Stat. § 766.63.[2]

Taken together, these considerations warrant application of the *Boyd v. Robinson* analysis to Wisconsin law, and they support a similar result in this case. In this case, regardless of how title was previously held, the debtor acquired his interest by virtue of the divorce judgment and subject to the lien. The lien did not attach to the debtor's interest, and it is accordingly not avoidable.

In an almost identical fact situation to that in *Boyd v. Robinson*, the Court of Appeals for the Ninth Circuit held that the lien *did* attach to an interest of the debtor in property. *In re Pederson*, 78 B.R. 264 (9th Cir. BAP 1987). The court said that the divorce decree extinguished the nondebtor's interest. The debtor was therefore the only legal owner of the property in question, and the non-debtor's lien attached to that property. Because the divorce decree expressly imposed a lien on the real property awarded to the debtor, the court held that the lien was a judicial lien under 11 U.S.C. § 101(32), and that it could be avoided under 11 U.S.C. § 522(f). The court thought this result harmonized different Code provisions in that because the debt is dischargeable under 11 U.S.C. § 523, the lien supporting that debt should likewise be avoidable under 11 U.S.C. § 522(f). *Id.* at 267.

Maus v. Maus, 837 F.2d 935 (10th Cir.1988), also allowed avoidance of a divorce judgment lien. The parties had agreed to the debtor's receiving the homestead "free and clear of any and all claims" of her former husband.

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[2] Christiansen, Haberman, Haydon, Kinnamon, McGarity and Wilcox, *Marital Property Law in Wisconsin*, ATS-CLE State Bar of Wisconsin (2nd ed. 1986) Ch. 3.

The court found that if a lien existed, it was a judicial lien and was avoidable under 11 U.S.C. § 522(f)(1). In rejecting the reasoning of *Boyd v. Robinson*, the court stated that "[u]nder this theory, the pre-existing interest does not pass to the debtor spouse under the divorce decree, and the lien attaches to the pre-existing interest of the creditor spouse rather than to the interest of the debtor spouse (cite omitted)." *Maus, supra*, at 939. The court discussed spouses' property rights at divorce under Kansas law, which are vested but undetermined until the aggregate estate is equitably divided by the divorce court. Since the divorce court "may" award the entire interest in particular items to one spouse alone, the court concluded, "[t]his construction of the nature of marital rights in Kansas by the Kansas courts clearly defeats the theory of a pre-existing property interest which is *not* extinguished by the divorce decree." (Emphasis added.) *Id.* While the *Maus* result may have been correct because of the parties' agreement, it appears that under Kansas divorce law, which is similar to Minnesota (*Boyd*) and Wisconsin in property division principles, the nondebtor spouse *did* have a pre-existing interest in the property which passed to the debtor via the divorce decree, and the *Maus* court failed to recognize that interest. *Boyd* found that the nondebtor had had a pre-existing ownership interest (as opposed to security interest) to which the lien attached, *Id.* at 1114-15, even though the ownership (title) interest was not retained by the nondebtor after the divorce. Ownership of property and title thereto passed to the debtor spouse by the divorce decree subject to the lien to secure payment. The bankruptcy court in *Maus* had also found that the lien was "tantamount to an equitable mortgage," but nowhere is this addressed by the Court of Appeals. *See In re Maus*, 48 B.R. 948, 951 (Bkrtcy.D.Kan.1985).

In re Grimes, 46 B.R. 84 (Bkrtcy.D.Md.1985), found such a lien avoidable under § 522(f), but it did so without discussion or reference to other judicial decisions. *Id.* at 86. The same court, again without analysis, in *In re Coffman*, 52 B.R. 667 (Bkrtcy.D.Md.1985), made the same finding.

Although the cases just cited are to the contrary, the greater weight of authority is that bankruptcy courts will not allow a debtor to avoid a lien arising from a property settlement in a divorce proceeding. *See, e.g., In re Wicks*, 26 B.R. 769 (Bkrtcy.D.Minn.1982); *In re Scott*, 12 B.R. 613 (Bkrtcy.W.D.Okl.1981). Several bankruptcy courts have based this result, as did *Boyd*, on a finding that the lien did not attach to an interest of the debtor in property. *In re Hart*, 50 B.R. 956, 961 (Bkrtcy.D.Nev.1985); *In re Williams, supra*. Other courts have used a variety of theories to achieve the same result.

One such theory is the equitable lien.[3] In some cases equitable liens have been imposed by bankruptcy courts when ex-spouses filed bankruptcy primarily to avoid compliance with the property division provisions of their divorce decrees. The equitable lien is a special and limited form of constructive trust. Both the equitable lien and the constructive trust are imposed to prevent unjust enrichment.[4] "The difference is that where the constructive trust gives completed title to the plaintiff, the equitable lien gives him only a security interest in the prop-

[3] However, an equitable mortgage is available under Wisconsin law only where a technical error prevented the creation of a legal mortgage. *Matter of Bailey*, 20 B.R. 906, 910 (Bkrtcy.W.D.Wis.1982). The question of perfection of the lien has not been raised in the instant case.

[4] Under certain circumstances, courts will also impose constructive trusts to protect an ex-spouse's interest in property. *In re Graham*, 28 B.R. 928 (Bkrtcy.N.D.Ia.1983). (Ex-wife given a constructive trust in ex-husband's homestead where he used the proceeds of marketable securities and cash value of life insurance policy to buy a home for the purpose of claiming homestead exemption in bankruptcy rather than paying ex-wife from those funds as directed by divorce decree).

erty, which he can then use to satisfy a money claim." *In re Bailey*, 20 B.R. 906, 910 (Bkrtcy.W.D.Wis.1982), quoting from Dobbs, Remedies § 4.3, at 249 (1973).

Where no lien is expressly imposed by the divorce decree, the unsecured property division payments may be discharged in bankruptcy. *See Stout v. Prussel*, 691 F.2d 859, 861 (9th Cir.1982). However, where property division decrees identify certain property as the source of payment, ex-spouses who are to receive payment are recognized as having an equitable lien in that property if unjust enrichment to the other spouse would result without it. *Caldwell v. Armstrong*, 342 F.2d 485, 490 (10th Cir.1965). In Wisconsin, it is not even necessary to identify certain property as the source of payment; equitable liens may be imposed by showing only that unjust enrichment may result to a former spouse if this debt can be discharged or avoided. *In re Bailey, supra.* Since equitable liens are common law liens and not judicial liens, they may not be avoided under 11 U.S.C. § 522(f).

Another theory (not applicable here) by which a lien of this kind has been preserved in bankruptcy is that although it resembles a judicial lien, it is in fact a security interest. The Bankruptcy Code defines a judicial lien as a "lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding." 11 U.S.C. § 101(32). A security interest is a "lien created by agreement." 11 U.S.C. § 101(45). Where a property division decree results from an agreement of the parties and expressly includes a lien to secure payment, the lien is considered to have the character of a security interest as well as meeting the definition of judicial lien. Since "security interest" in these situations is considered the more accurate category, such liens have been held to be unavoidable under 11 U.S.C. § 522(f). *In re Hart, supra*, at 961 (lien considered more in nature of purchase money obligation than judicial lien); *In re Rosen*, 34 B.R. 648 (Bkrtcy.E.D.Wis.1983), aff'd. No. 83-C-2002 (1984).

As a result of these court decisions that distinguish between divorce decree liens which are the result of an agreement between the parties and those which are judicially imposed, the impression was created that because the former cannot be avoided as security interests, the latter *can* be avoided as judicial liens. *In re Wicks*, 26 B.R. 769 (Bkrtcy.D.Minn.1982). At least one court has expressly rejected this distinction. *Thomas, supra*, at 13. However, that analysis is unnecessary here given this court's finding that the lien in this case does not attach to an interest of the debtor in property and for that reason is unavoidable.

Valuation of Assets

The debtor's ex-spouse has objected to the valuation of assets set out by the debtor in his schedule. She claims that *res judicata* or collateral estoppel [5] confine the debtor to the findings of the state court divorce decree as to the value of assets.

For either *res judicata* or collateral estoppel to apply, the first requirement is that the claim or issue sought to be precluded be the same as in the prior action. *Klingman v. Levinson*, 831 F.2d 1292 (7thCir.1987). In the two court actions under consideration, the adversary proceeding in bankruptcy and the divorce, there appears to be a common issue: valuation of assets. This apparent commonality is deceiving however because the valuation involves two different dates. In the divorce proceeding, the property was assigned a value several months before the decree of divorce was entered. In bankruptcy, property claimed as exempt must be valued as of the date the petition is filed. 11 U.S.C. 522(a)(2). Real and

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[5] *Res judicata* in its broader sense is sometimes taken to include both concepts. *See Brown v. Felsen*, 442 U.S. 127, 99 S.Ct. 2205, 60 L.Ed.2d 767 (1979); *Spilman v. Harvey*, 656 F.2d 224 (6th Cir. 1981).

personal property alike can appreciate or depreciate in a period of several months. Therefore, the valuation of property in a divorce decree cannot be binding on a bankruptcy court. *In re Erwin*, 25 B.R. 363 (Bkrtcy.D. Minn.1982).

An order will be entered denying the debtor's motion under § 522(f)(1).

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 87-02046

IN RE: GERALD J. SANDERFOOT, GERALD SANDERFOOT, GERALD SANDERFOOT, f/d/b/a IMPROVEMENTS UNLIMITED and d/b/a RAGUN'S BAR,
Debtor(s).

ORDER

The court having issued its decision in writing on this date,

IT IS ORDERED:

1. The debtor's motion to avoid the lien of Jeanne Farrey Sanderfoot on his homestead is hereby denied.
2. In light of the court's order denying avoidance of the lien, the objection of Jeanne Farrey Sanderfoot to the debtor's valuation is dismissed as moot.

Dated at Milwaukee, Wisconsin, March 9, 1988.

/s/ Margaret Dee McGarity
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 87-02046

IN RE: GERALD J. SANDERFOOT, GERALD SANDERFOOT, GERALD SANDERFOOT, f/d/b/a IMPROVEMENTS UNLIMITED and d/b/a RAGUN'S BAR,
Debtor.

STIPULATED FACTS AND ISSUES OF LAW

The debtor, Gerald J. Sanderfoot, a/k/a Gerald Sanderfoot, f/d/b/a Improvements Unlimited and d/b/a Ragun's Bar, by his attorney, Harvey G. Samson of Bollenbeck, Block, Seymour, Rowland & Samson, S.C., Jeanne Farrey, f/k/a Jeanne Sanderfoot, by her attorney, Charles J. Hertel, Dempsey, Magnusen, Williamson & Lampe and Chapter 7 Bankruptcy Trustee, Paul G. Swanson, hereby stipulate to the following facts and issues of law with respect to the objection to claim of exempt assets, to motion for lien avoidance and motion for relief from the automatic stay in bankruptcy filed by said Jeanne Farrey in the above-mentioned matter:

I. *Stipulated Facts*

1. The debtor, Gerald J. Sanderfoot, is an adult residing at 540 Island Road, Route 2, Hortonville, Wisconsin 54944. The debtor is also know as Gerald Sanderfoot and Gerry J. Sanderfoot, f/d/b/a Improvements Unlimited and d/b/a Ragun's Bar.

2. The debtor commenced the above-captioned bankruptcy matter by filing a petition for relief under Chapter 7 of the United States Bankruptcy Code with the Bankruptcy Court for the Eastern District of Wisconsin on May 4, 1987. A meeting of creditors pursuant to § 341(a) of the Bankruptcy Code was held on May 28, 1987. The debtor filed the Petition, Schedules and Statement of Financial Affairs with the Bankruptcy Court, a copy of which is attached hereto as Exhibit "A".

3. The debtor and Jeanne Farrey f/k/a Jeanne Sanderfoot, were married. Their marriage was terminated by Judgment of Divorce entered in Circuit Court for Outagamie County, Wisconsin on February 5, 1987. A copy of the Findings of Fact, Conclusions of Law and Judgment of Divorce entered in such action is attached hereto as Exhibit "B".

4. The divorce proceedings between the debtor and Jeanne Farrey were contested proceedings. The issues in dispute included, but were not limited to, property division, valuation of assets, maintenance, child support, and contribution for attorneys fees. Each of the parties presented evidence regarding the value of the parties' marital property.

5. Under the Judgment of Divorce, the debtor was awarded the real property located at 540 Island Road, Route 2, Hortonville, Wisconsin 54944, which was found to have a value of $104,000.00. The Judgment of Divorce further provided that the debtor was ordered to pay Jeanne Farrey the sum of $29,208.44. Such amount was to be paid in two installments of $14,604.22 each, with the first such installment being due and payable on or before January 10, 1987 and the second installment to be due and payable on April 10, 1987. As collateral for and to secure the payment of such amount, the judgment further provides that Jeanne Farrey shall have a lien in and to the real property located at 540 Island Road, Route 2, Hortonville, Wisconsin. The debtor has not paid the amounts required to be paid by him under the said divorce decree.

6. To date Jeanne Farrey has not delivered a quit claim deed to debtor with respect to her interest in and to the real property located at 540 Island Road, Route 2, Hortonville, Wisconsin.

7. The real property located at 540 Island Road, Route 2, Hortonville, Wisconsin consists of 27.43 acres with a residence located thereon. The debtor valued such property on Schedule B-1 as having a market value of $82,750.00. The Circuit Court for Outagamie County, Wisconsin found that the said real property had a value as of September 12, 1986 of $104,000.00. By stipulation, the parties agreed to have the said property appraised by John R. Mau. Mr. Mau valued such property as of October 16, 1987 to be $95,000.00. Attached hereto as Exhibit "C" is a copy of Mr. Mau's appraisal.

8. The Circuit Court for Outagamie County, Wisconsin also valued certain other assets owned by the parties. The values of such assets are set forth on the Findings of Fact, Conclusions of Law and Judgment of Divorce.

9. The debtor has moved the Bankruptcy Court to avoid the lien held by Jeanne Farrey in and to the real property located at 540 Island Road, Route 2, Hortonville, Wisconsin 54944. Jeanne Farrey has objected to such motion.

10. Jeanne Farrey has objected to the debtor's claim of exempt assets on the basis that the debtor has substantially understated the value of the assets claimed as exempt.

11. Jeanne Farrey has further moved the Bankruptcy Court for relief from the automatic stay in bankruptcy on the basis that the debtor has failed to abide by certain other terms and conditions of the judgment of divorce by failing and neglecting to make the contribution towards Jeanne Farrey's attorney's fees in the sum of $1,600.00, by failing to make payments of child support and maintenance as required under said judgment, for failing to

deliver to Jeanne Farrey certain personal property awarded to her under the judgment, and for failing to conduct the auction required thereunder.

II. *Stipulated Issues of Law*

A. Whether the debtor pursuant to 11 U.S.C. § 522 (1), may avoid the lien in and to the real property located at 540 Island Road, Route 2, Hortonville, Wisconsin, granted to Jeanne Farrey under the judgment of divorce entered in Circuit Court for Outagamie County, Wisconsin on February 5, 1987.

B. Whether the debtor is bound by the determination of the value of the assets of the debtor rendered by the Circuit Court for Outagamie County, Wisconsin, as part of the divorce proceedings between the debtor and Jeanne Farrey, under the doctrines of *res judicata* and collateral estoppel.

Dated this the 16th day of December, 1987.

BOLLENBECK, BLOCK, SEYMOUR,
ROWLAND & SAMSON, S.C.
Attorneys for Gerald Sanderfoot

By: /s/ Harvey G. Samson
HARVEY G. SAMSON

DEMPSEY, MAGNUSEN,
WILLIAMSON & LAMPE
Attorneys for Jeanne Farrey

By: /s/ Charles J. Hertel
CHARLES J. HERTEL

/s/ Paul G. Swanson
PAUL G. SWANSON
Bankruptcy Trustee

Name—Harvey G. Samson
Attorney for Petitioner

Address—621 West Lawrence Street
P.O. Box 845
Appleton, WI 54912

Telephone: (414) 731-9101

[*NOTE:* These official forms should be observed and used with such alterations as may be appropriate to suit the circumstances. See Rule 9009.]

VOLUNTARY PETITION

☒ INDIVIDUAL ☐ JOINT PETITION

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

87-02046

IN RE: GERALD SANDERFOOT, GERALD SANDERFOOT, JERRY SANDERFOOT, f/d/b/a IMPROVEMENTS UNLIMITED and d/b/a RAGUN'S BAR

Debtor [set forth here all names including trade names used by Debtor within last 6 years].

Social Security Number 396-48-2556 and Debtor's Employer's Tax Identification No. 359-651

Social Security Number ———— and Debtor's Employer's Tax Identification No. ————

———————

VOLUNTARY PETITION

1. Petitioner's mailing address, including county, is 540 Island Road, Route 2, Hortonville, Outagamie County, Wisconsin, 54944.

2. Petitioner has resided [*or* has had his (their) domicile *or* has had his (their) principal place of business *or* has had his (their) principal assets] within this district for the preceding 180 days [*or* for a longer portion of the preceding 180 days than in any other district].

3. Petitioner is qualified to file this petition and is entitled to the benefits of title 11, United States Code as a voluntary debtor.

4. [*If appropriate*] A copy of petitioner's(s) proposed plan, dated ————, is attached [*or* Petitioner(s) intends to file a plan pursuant to chapter 11 *or* chapter 13] of title 11, United States Code.

5. [*If Petitioner(s) is (are) a Corporation*] Exhibit "A" is attached to and made part of this petition.

6. [If Petitioner(s) is (are) (an) individual(s) whose debts are primarily consumer debts.] Petitioner(s) is (are) aware that [he *or* she] may proceed under chapter 7 *or* 13 of title 11, United States Code, understands the relief available under each such chapter, and chooses to proceed under chapter 7 *or* such title.

7. [If Petitioner(s) is (are) (an) individual(s) whose debts are primarily consumer debts and such petitioner(s) is (are) presented by an attorney.] A declaration or an affidavit in the form of Exhibit "B" is attached to and made a part of this petition.

WHEREFORE, petitioner prays for relief in accordance with chapter 7 [*or* chapter 11 *or* chapter 13] of title 11, United States Code.

Signed: /s/ Harvey G. Samson
HARVEY G. SAMSON
[Attorney for Petitioner(s)]

Address: 621 West Lawrence Street
P.O. Box 845
Appleton, WI 54912

I, GERALD J. SANDERFOOT, the petitioner(s) named in the foregoing petition, certify under penalty of perjury that the foregoing is true and correct.

May 4, 1987

/s/ Gerald J. Sanderfoot
GERALD J. SANDERFOOT
Petitioner

Schedule A-2—Creditors Holding Security.

Name of creditor and complete mailing address including zip code	Description of security and date when obtained by creditor Specify when claim was incurred and the consideration therefore: when claim is subject to setoff, evidenced by a judgment, negotiable instrument, or other writing, or incurred as partner or joint contractor, so indicate; specify name of any partner or joint contractor on any debt.	Indicate if claim is contingent, unliquidated, or disputed.	Market value	Amount of claim without deduction of value of security
1. Home Savings & Loan 320 East College Avenue Appleton, WI 54912-0119	First Mortgage on Residence— Incurred in 1979	Not contingent, unliquidated or disputed	$82,750.00	$37,490.00
2. H. J. Jennerjohn Route 1 Appleton, WI 54915	Second Mortgage on Residence— Incurred 1985-86	Contingent		9,935.00
3. Marine Bank 200 West College Avenue Appleton, WI 54911	Loan—Incurred 1985-86; Security: 1980 Olds. Cutlass Supreme and 1963 Chevy Impala	Not contingent, unliquidated or disputed	1,000.00 500.00	3,332.00
4. Jeanne Sanderfoot Broadway Drive Route 2 Hortonville, WI 54944	Lien Against Residence per Divorce Judgment	Disputed		29,208.00
		Total	$84,250.00	$79,965.00

Schedule B—Statement of All Property of Debtor

Schedules B-1, B-2, B-3 and B-4 must include all property of the debtor as of the date of the filing of the petition by or against him

Schedule B-1.—Real Property

Description and location of all real property in which debtor has an interest (including equitable and future interests, interests in estates by the entirety, community property, life estates, lease-holds, and rights and powers exercisable for his own benefit)	Nature of interest (specify all deeds and written instruments relating thereto)	Market value of debtor's interest with deduction for secured claims listed in Schedule A-2 or exemptions claimed in Schedule B-4
Residence located at 540 Island Road, Route 2, Hortonville, WI 54944:		
#1 E½ of the NW NW less S. 208.72′ of N. 1079.85′ of E. 417.44′ less hwy./con. NW corner section E. 658.88′ S. 57°14′ to P.O.B., S. 1,096.68′ to edge of Rat River 310′N. 85.89′ E. 89.08′ NE 490′ N.248.30′ W. 34.03′ N. 8° W. 101.16′ N. 114.84′ N. 450 W. 35.29° W. 585.25 to P.O.B., Sec. 29, Town of Greenville, Outagamie County. Said parcel contains 5.21 ac.		$72,000.00
#2 E½ of the SW NW less S. 531.34′ of N. 2229.08′ of the E. 370′/Sec. 29, Town of Greenville, Outagamie County. Said parcel contains 15.49 ac.		7,750.00
#3 S. 531.34 of the N. 2229.08′ of the 370′ of the W½ of the NW. Said parcel contains 4.51 ac.	Total	3,000.00
		$82,750.00

STATE OF WISCONSIN
OUTAGAMIE COUNTY

CIRCUIT COURT BRANCH V
FAMILY COURT BRANCH

Case No. 84-FA-657

IN RE THE MARRIAGE OF: JEANNE SANDERFOOT,
Petitioner,

and

GERALD SANDERFOOT,
Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT OF DIVORCE

TRIAL

PRESIDING JUDGE: The Honorable Michael W. Gage

PLACE: City of Appleton, Outagamie County, Wisconsin

DATE: September 12, 1986

APPEARANCES:

Petitioner in person and by Robert B. Loomis, attorney for the Petitioner. Respondent in person and by Jerome H. Block, attorney for the Respondent.

I, Judge before whom this action was tried, do hereby make these Findings of Fact, Conclusions of Law and Judgment.

FINDINGS OF FACT

1. For at least six (6) months next preceding the commencement of this action, the Petitioner has been a continuous resident of the State of Wisconsin, and of this County for at least thirty (30) days prior to such commencement; further, that all parties have been duly served, that one hundred twenty (120) days have lapsed since the commencement of this action, and that the parties have been informed of and the moving party has met the counseling requirements of Sec. 767.083, Wis. Stats.

2. The Petitioner in this action is: Jeanne Sanderfoot

ADDRESS: Route 2, Island Road, Box 540
Hortonville, WI 54944

AGE: 36

DOB: August 18, 1950

SSN: 395-52-1465

OCCUPATION: Part-time Maintenance Person

* * * *

VIII. INCOME TAXES

The parties stipulate and agree that for federal and state (Wisconsin) income tax purposes, for the period commencing on and after January 1, 1986, each of the parties' income, wages, earnings or other compensation shall be deemed to be that party's individual or separate property and any deductions, credits, payments or expenses shall also be the individual or separate property of the party making or paying said deduction, credit, payment or expense. Each party specifically agrees to pay his/her own respective tax liability, tax penalty, or tax interest on his/her own individual or separate income subsequent to January 1, 1986, and each party agrees to hold the other harmless for all payments

thereof on each party's own individual or separate income. The parties specifically stipulate and agree that any refunds received by either party on their own individual or separate income for the period of time subsequent to January 1, 1986 shall be that party's own individual or separate property.

IX. PROPERTY DIVISION

The Court made substantial findings concerning the property division and said findings are all found in the transcript concerning the hearing on September 12, 1986.

Real Estate—House. The Court awards the real estate —house to the Respondent herein for $104,000.00

Murphy Construction Contract. The Court does not consider this item a marital debt. The Court finds there is no interest and no demand for payment. Furthermore, Mr. Murphy stated he has an expectation of removing an equal amount of gravel to the amount due. Therefore, the Court assigns no amount as an asset or a debt relating to the Murphy Construction contract. The Court, however, awards the Murphy Construction contract, and any amount of debt or asset relating to the contract, to the Respondent.

Ragun's Bar. The Court made substantial findings which can be found in the transcript concerning the hearing held on September 12, 1986.

The Court awards the business known as Ragun's Bar to the Respondent for the value of $18,000.00 which includes the inventory and all cash on hand.

Motor Vehicles. Per the stipulation of the parties, the Court awards the 1980 Olds automobile to the Respondent for $1,000.00 and the 1963 Chevy automobile to the Respondent for $3,000.00.

1981 Datsun Insurance Proceeds. The Court considers the 1981 Datsun insurance proceeds a marital asset and

awards this marital asset to the Respondent in the amount of $3,400.00.

1985 Income Taxes. The Court awards any refunds or liabilities concerning the 1985 income taxes to be split 50/50 between the parties.

Dan Baehman Receivable. The Court awards the Dan Baehman receivable to the Respondent for no value.

Petitioner's Discrimination Suit. The Court awards the Petitioner's discrimination suit to the Petitioner for no value.

Tom Hast Notes. The Court orders that the Tom Hast notes are not an asset and the Court treats the Tom Hast notes as income which is available for the support obligations and responsibilities of the Respondent herein. Accordingly, the Tom Hast notes that were paid are not considered an asset and are not awarded to either party pursuant to the property balance sheet.

Personal Property Items. The Petitioner is awarded the following items of personal property at the following values:

Personal Property Item	Value
Living room furniture with end tables	$ 700.00
Lamps	40.00
Wooden rocker	60.00
Color TV	125.00
Sanyo VCR—Beta	200.00
Buffet	25.00
High chair and crib	30.00
Kirby vacuum	349.00
Washer and dryer	200.00
Religious material	20.00
Garden set (rakes, shovel, hoe)	30.00
Mechanics set for household	20.00
Dove pictures	25.00
Crochet hat	3.00
Stereo	200.00

Personal Property Item	Value
Cassette player	20.00
Dog clippers	2.00
Ironing board and iron	5.00
Petitioner's books	2.00
Hooked rug and supplies	2.00
Pommander and vase	1.00
Double coffee pot	1.00
Fruit jars	5.00
Canned food in jars	- 0 -
Frozen food	- 0 -
Gardening supplies	10.00
Closepins	1.00
Canners and scales	10.00
Picnic table gift	- 0 -
Macrame hanger	1.00
Scatter rug in bath	1.00
Fabric patterns	2.00
Bathroom scale	1.00
TOTAL	$2,091.00

The Court awards to the Respondent the following personal property items with the appropriate values.

Personal Property Item	Value
Bedroom chair (wicker)	$ 35.00
½ trans	200.00
Gold mirror	10.00
Farm house picture	10.00
Brass leaves	3.00
Picture album	- 0 -
Record albums	20.00
Luggage	25.00
Glasses	1.00
Tupperware	5.00
Fan	5.00
Lawn mower	40.00
King sheets	5.00
Coleman stove and lantern	30.00
Tent	50.00
Lawn chairs	15.00

Personal Property Item	Value
White wool blanket	10.00
Outdoor grill	20.00
Games	10.00
Baking pans	3.00
Plants	5.00
Green bowls	2.00
Hutch	300.00
Dining room table and chairs	75.00
Dishwasher	125.00
Family room furniture with end table	350.00
Tractor and trailer	2,000.00
Guns	575.00
Miscellaneous tools and equipment	4,500.00
TOTAL	$8,429.00

The parties are specifically ordered to make arrangements to have an auction on or before November 12, 1986. The parties are ordered to agree as to the time and place of the auction, the auctioneer, and the method of sale. The items ordered to be sold at the auction are as follows: Stove, refrigerator, downstairs refrigerator, freezer, televisions (1 black and white, 1 remote control color, 1 color), lamps, 2 stereos, desk with chair, bedroom set with 2 nightstands, wicker chair, bedroom lamps, Kirby vacuum, game table with 4 stools, buffet to match dining set, snowmobiles, houseboat, woodstove, lawn mower and trailer, 1 push lawn mower, camping equipment and kitchen, sleeping bags, Weber grill, washer and dryer, canoe.

The Court further orders that the parties shall split the cost of sale of the auction on a 50/50 basis and the net proceeds received from the auction shall be distributed 50/50 between the parties. Both parties are specifically ordered to cooperate with the auction procedure and, in the event, there are any problems concerning the sale of these items at auction, either party has the right to petition to the Judge to have this matter resolved by Court order.

In addition to all of the above, the children are awarded their own respective guns. The children are also awarded the Amphicat, trailer and ice shanty.

The Court specifically orders that the bar of silver was sold and there is no value affixed to this asset.

X. DEBTS AND FINANCIAL OBLIGATIONS

The Court hereby awards the debts and financial obligations of the parties all as follows:

Debts	Awarded To	Amount
Home Savings & Loan—house mortgage	Respondent	$37,490.00
Clearly building debt	Respondent	14,131.00
Dr. Weber	Petitioner	80.00
Carenow	Petitioner	23.00
Nicolet Clinic	Petitioner	98.50
Dr. Pilon	Petitioner	49.60
Attorney Long 50/50 between the parties		
Kindt Corporation	Respondent	493.90
Buss Electric	Respondent	144.98
Ear, nose and throat	Petitioner	52.00
Jim's Plumbing	Respondent	71.77
St. Elizabeth Hospital	Petitioner	31.50
Urology Associates	Respondent	271.00
Radiology Associates	Petitioner	354.50
N. R. A.	Respondent	250.00
Wood and Dale Nursery	Respondent	374.06
Valley Collection Service	Respondent	213.20
Jennerjohn (special assessment)	Respondent	1,467.54
Jennerjohn (interest)	Respondent	1,300.00

(The Court orders that the Respondent shall receive the marital debt share of the Jennerjohn interest debt in the amount of $1,300.00, and any remaining balance due on the Jennerjohn interest debt is an individual debt of the Respondent.)

Marine Bank	Respondent	14.00
$1,000.00 note	Respondent	1,000.00
$6,000.00 note	Respondent	6,000.00
Theda Clark	Respondent	3,399.00
Nicolet Clinic	Respondent	779.00

Debts	Awarded To	Amount
St. Elizabeth Hospital	Respondent	182.00
New London Hospital	Respondent	870.00
Oshkosh Ambulance	Respondent	185.76
Federal tax liens	Respondent	9,000.00
Valley Dermatology	Petitioner	120.00
Outagamie County Human Services	Petitioner	190.00
Lied's (tree)	Respondent	300.00
Smitty's (car)	Respondent	383.00

With the exception of all of the above, which are the specific responsibility of the party the particular debt is awarded to, and which each party shall specifically hold the other party harmless for the payment thereof, each of the parties shall pay and be responsible for his or her own debts and financial obligations due and owing after the commencement of this action, and each shall hold the other harmless for the payment thereof. Neither party shall contract any indebtedness or incur any liability for which the other party may be held liable. Neither party shall charge upon the credit of the other party.

XI. PROPERTY BALANCE PAYOUT FROM RESPONDENT TO PETITIONER AND PROPERTY BALANCE SHEET

The above-described Order of the Court concerning the distribution of the assets and debts of the parties is set forth fully at length in the attached property balance sheet to this Judgment of Divorce, and said property balance sheet is incorporated herein at length as if set forth fully below. The Court hereby orders the Respondent to pay to the Petitioner the amount of $29,208.44, all as follows:

1. $14,604.22 shall be paid from the Respondent to the Petitioner on or before January 10, 1987. The payment of $14,604.22 shall be made payable in cash, certified check or bank money order and shall be made payable to the Herrling, Clark Law Firm Trust Account in the care of the Petitioner herein.

2. . $14,604.22 shall be paid from the Respondent to the Petitioner on or before April 10, 1987. The amount of $14,604.22 shall be made payable in cash, certified check or bank money order and shall be made payable to the Herrling, Clark Law Firm Trust Account in care of the Petitioner herein.

The Petitioner herein shall have a lien against the real estate property of the Respondent for the total amount of money due her pursuant to this Order of the Court, i.e. $29,208.44, and the lien shall remain attached to the real estate property of the Respondent until the total amount of money is paid in full. Specifically, the lien shall attach to the house/real estate of the Respondent located at 540 Island Road, Route 2, Hortonville, Town of Greenville, Outagamie County, Wisconsin, and more specifically and legally described as:

#1 E½ of the NW NW less S.208.72′ of N.1079.85′ of E.417.44′ less hwy/con NW cor sec. E.658.88′ S57dg.14′ to P.O.B. S.1,096.68′ to edge of Rat River NE 310′ N.85.89′E 89.08′ NE 490′ N248.30′ W.34.03′ N.8dg. W.101.16′ N.114.84′ N450 W.35.29dg. W.585.25 to P.O.B. Sec. 29 Town of Greenville, Outagamie County. Said Parcel Contains (5.21-Ac.)

#2 E½ of the SW NW Less S. 531.34′ of N.2229.08′ of the E. 370′/Sec. 29 Town of Greenville, Outagamie County (Said Parcel Contains 15.49-Ac.)

#3 S. 531.34 of the N. 2229.08′ of the E. 370′ of the W½ of the NW (Said Parcel contains 4.51-Ac.).

The Oral Decision of the Court, as set forth above, is considered a full, final, complete and equitable property division, in recognition of a species of community ownership of the marital estate resembling a division of the property between co-owners vested at the time of commencement of this action.

20. *Wisconsin as Forum.* The forum for all disputes shall be the State of Wisconsin, unless the parties otherwise agree in writing.

21. *Divesting of Property Rights: Mutual Releases.* Each party shall be divested of and waives, renounces and gives up, any and all right, title and interest in and to the property awarded to the other. All property and money received or retained by the parties shall be the separate property of the respective parties, free and clear of any right, title, interest or claim of the other party, and each party shall have the right to deal with, and dispose of his or her separate property as fully and effectively as if the parties had never been married, except as expressly provided for in this agreement, and each party accepts the property herein in full satisfaction of all property rights and all obligations arising out of the marital relationship of the parties.

22. *Non-Compliance.* Disobedience of the Court Orders is punishable under Chapter 785 by commitment to the County jail or house of correction until such Judgment is complied with and the costs and expenses of the proceedings are paid or until the party committed is otherwise discharged, according to law.

23. *Restraining Provisions.* Both parties agree not to molest, interfere with, or impose any restraint upon the personal liberty of each other.

24. *Restoration of Name.* The Petitioner is forthwith restored the use of her former surname, to wit: FARREY.

25. *Effective Date.* The effective date of this judgment of divorce is the 12th day of September, 1986.

26. *Execution of Documents.* Now or in the future, upon demand, the parties agree to execute and deliver any and all documents which may be necessary to carry out the terms and conditions of this Judgment.

JUDGMENT IS HEREBY RENDERED, AND THE CLERK IS ORDERED TO ENTER THIS JUDGMENT.

Dated at Oshkosh, Wisconsin, this —— day of ———, 1986.

BY THE COURT:

HONORABLE MICHAEL W. GAGE
Circuit Court Judge, Branch No. V
Outagamie County, Wisconsin

Approved as to form and content
this —— day of ————, 1986.

KATHLEEN GALLES LHOST
Family Court Commissioner
Outagamie County, Wisconsin

Approved as to form and content
this 25th day of November, 1986.

/s/ Robert B. Loomis
ROBERT B. LOOMIS
Attorney for Petitioner

Approved as to form and content
this —— day of ————, 1986.

JEROME H. BLOCK
Attorney for Respondent

SANDERFOOT DIVORCE — September 12, 1986
Case No. 84-FA-657

PROPERTY BALANCE SHEET

A. ASSETS	Husband	Wife
1. Real Estate—House	$104,000.00	$ -0-
2. Murphy Construction Contract	-0-	-0-
3. Ragun's Bar	18,000.00	-0-
4. 1980 Olds	1,000.00	-0-
5. 1963 Chevy	3,000.00	-0-
6. 1981 Datsun Insurance Proceeds	3,400.00	-0-
7. 1985 Income Tax Refunds or Liabilities—50/50 between the parties		
8. Dan Baehman Receivable	X	-0-
9. Petitioner's Discrimination Suit	-0-	X
10. Personal Property Awarded to Parties	8,429.00	2,091.00
11. Remaining Personal Property to be Sold at Auction—50/50 between the parties		
TOTAL ASSETS	$137,829.00	$ 2,091.00
B. DEBTS		
1. Home S. & L.—House Mortgage	37,490.00	-0-
2. Cleary Building	14,131.00	-0-
3. Dr. Weber	-0-	80.00
4. Carenow	-0-	23.00
5. Nicolet Clinic	-0-	98.50
6. Dr. Pilon, M.D.	-0-	49.60
7. Attorney Long—50/50 between the parties		
8. Kindt Corporation	493.90	-0-
9. Buss Electric	144.98	-0-
10. Ear, Nose, Throat	-0-	52.00
11. Jim's Plumbing	71.77	-0-
12. St. Elizabeth Hospital	-0-	31.50
13. Urology Associates	271.00	-0-
14. Radiology Associates	-0-	354.50
15. N.R.A.	250.00	-0-
16. Wood & Dale Nursery	374.06	-0-
17. Valley Collection Service	213.20	-0-
18. Jennerjohn (Special Assessment)	1,467.54	-0-
19. Jennerjohn (Interest)	1,300.00	-0-
20. Marine Bank	14.00	-0-
21. $1,000.00 Note	1,000.00	-0-
22. $6,000.00 Note	6,000.00	-0-
23. Theda Clark	3,399.00	-0-
24. Nicolet Clinic	779.00	-0-

B. DEBTS—Continued	Husband	Wife
25. St. Elizabeth Hospital	182.00	-0-
26. New London Hospital	870.00	-0-
27. Oshkosh Ambulance	185.76	-0-
28. Federal Tax Liens	9,000.00	-0-
29. Valley Dermatology	-0-	120.00
30. Outagamie County Human Services	-0-	190.00
31. Lied's (Tree)	300.00	-0-
32. Smitty's (Car)	383.00	-0-
TOTAL DEBTS	$ 78,320.21	$ 999.10
NET ESTATE	$ 59,508.79	$ 1,091.90
Payout From Husband to Wife	(29,208.45)	29,208.44
	$ 30,300.34	$30,300.34